No. 17-1091	
Title:	Tyson Timbs, Petitioner v. Indiana
Docketed:	February 2, 2018
Lower Ct:	Supreme Court of Indiana
Case Numbers:	(27S04-1702-MI-70)
Decision Date:	November 2, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jan 31 2018	Petition for a writ of certiorari filed. (Response due March 5, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Feb 06 2018	Blanket Consent filed by Petitioners, Tyson Timbs, et al. and Respondent Indiana. **Blanket Consent**
Feb 22 2018	Motion to extend the time to file a response is granted and the time is extended to and including May 4, 2018.
Feb 22 2018	Motion to extend the time to file a response from March 5, 2018 to May 4, 2018, submitted to The Clerk. **Main Document**
Mar 05 2018	Brief amicus curiae of Constitutional Accountability Center filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 05 2018	Brief amici curiae of Professors filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 05 2018	Brief amici curiae of The Southern Poverty Law Center and The Cato Institute filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 05 2018	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 05 2018	Brief amicus curiae of The Chamber of Commerce of the United States of

	America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 04 2018	Brief of respondent State of Indiana in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 16 2018	Reply of petitioner Tyson Timbs filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 22 2018	DISTRIBUTED for Conference of 6/7/2018.
Jun 11 2018	DISTRIBUTED for Conference of 6/14/2018.
Jun 18 2018	Petition GRANTED.
Jun 26 2018	Motion for an extension of time to file the joint appendix and petitioner's brief on the merits filed. **Main Document**
Jul 11 2018	Motion to extend the time to file the joint appendix and petitioner's brief on the merits granted and the time is extended to and including September 4, 2018.
Jul 12 2018	Blanket Consent received from counsel of record for petitioner filed. **Blanket Consent**
Jul 12 2018	Motion to dispense with printing the joint appendix filed by petitioner Tyson Timbs. **Main Document** **Proof of Service**
Jul 23 2018	Blanket Consent received from counsel of record for Respondent, State of Indiana filed. **Blanket Consent**
Aug 24 2018	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Sep 04 2018	Brief of petitioner Tyson Timbs filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 05 2018	Amicus brief of Judicial Watch, Inc.; Allied Educational Foundation not accepted for filing. (To be resubmitted with correct documentation - September 10, 2018)
Sep 05 2018	Brief amici curiae of Judicial Watch, Inc. and Allied Educational Foundation filed. **Main Document** **Proof of Service** **Certificate of Word Count**

Sep 10 2018	Brief amicus curiae of Institute for Free Speech filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 10 2018	Brief amici curiae of Eighth Amendment Scholars in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 10 2018	Brief amici curiae of The American Civil Liberties Union, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of Constitutional Accountability Center filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of Constitutional Accountability Center filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of Pacific Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of Foundation for Moral Law filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of Juvenile Law Center, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Amicus brief of Indiana Criminal Defense Lawyers not accepted for filing. (Duplicate submission - September 12, 2018)
Sep 11 2018	Amicus brief of Indiana Criminal Defense Lawyers not accepted for filing. (Duplicate submission - September 12, 2018)
Sep 11 2018	Brief amici curiae of Indiana Criminal Defense Lawyers filed. **Certificate of Word Count** **Main Document** **Proof of Service**
Sep 11 2018	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of The Rutherford Institute filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 11 2018	Brief amici curiae of Scholars filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amici curiae of Drug Policy Alliance, et al. filed.

	Main Document **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of Chamber of Commerce of the United States filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 11 2018	Amicus brief of Cause of Action Institute not accepted for filing. (To be re-submitted with correction)
Sep 11 2018	Brief amici curiae of DKT Liberty Project, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of American Bar Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of American Civil Rights Union filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Brief amicus curiae of Cause of Action Institute filed (Re-submitted with correction on September 14, 2018). **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 04 2018	Brief of respondent State of Indiana filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	SET FOR ARGUMENT ON Wednesday, November 28, 2018
Oct 11 2018	Brief amicus curiae of National Association of Counties, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Oct 19 2018	CIRCULATED
Nov 02 2018	Record received from the Supreme Court of Indiana is electronic and complete.
Nov 05 2018	Reply of petitioners Tyson Timbs, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 28 2018	Argued. For petitioner: Wesley P. Hottot, Seattle, Wash. For respondent: Thomas M. Fisher, Indiana Solicitor General, Indianapolis, Ind.

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No. 17-_____

In The
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners are Tyson Timbs and his 2012 Land Rover LR2. Respondent is the State of Indiana. Additional plaintiffs before the trial court were the J.E.A.N. Team Drug Task Force, the Marion Police Department, and the Grant County Sheriff's Department.

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INTRODUCTION

This case presents an unsettled question of national importance: whether the Excessive Fines Clause of the Eighth Amendment is incorporated against the States. Although the majority of state and federal courts to consider this question have applied the Clause to the States, a growing minority of state courts have chosen not to. The Indiana Supreme Court in this case aligned itself with that minority view, relying on a sentence of "dicta" from *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), while acknowledging an open break with other jurisdictions. *See* App. 8-9. Unless and until this Court "authoritatively" holds that the Excessive Fines Clause is incorporated against the States, the Indiana Supreme Court announced that it would "decline to find or assume incorporation"—or even engage with the incorporation analysis. App. 8.

The Indiana Supreme Court's decision deepens a growing divide on the question presented. Although two Circuits and at least 14 state high courts apply the Excessive Fines Clause to the States, a minority of courts—in Montana, Mississippi, Michigan, and now Indiana—believe that the Clause does not apply. And despite their "coordinate responsibility" to give effect to federally protected rights, *Howlett* v. *Rose*, 496 U.S. 356, 367 (1990), each of these jurisdictions has written off the Excessive Fines Clause without evaluating this Court's incorporation precedent. As a result, Petitioner Tyson Timbs—along with the 6.6 million residents of Indiana and more than 13 million residents of the three other minority jurisdictions—enjoys Eighth

Amendment protection against fines and forfeitures imposed by the federal government but not against those imposed by state and local authorities. *See generally Austin* v. *United States*, 509 U.S. 602, 621-22 (1993) (holding that the Excessive Fines Clause applies to civil forfeitures imposed by the federal government).

Beyond exacerbating a split of authority, the Indiana Supreme Court's decision also breaks with this Court's precedent. The Eighth Amendment embodies three "parallel limitations" on the government's power to punish: the Cruel and Unusual Punishments Clause, the Excessive Bail Clause, and the Excessive Fines Clause. *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989) (quoting *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977)). Together, these Clauses operate to secure a single, fundamental right to be free from excessive punishments. For that reason, this Court has repeatedly observed that the three Clauses are incorporated in equal measure against the States. *See, e.g.*, *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014); *Cooper Indus.* v. *Leatherman Tool Grp.*, 532 U.S. 424, 433-34 (2001); *Thompson* v. *Oklahoma*, 487 U.S. 815, 819 n.1 (1988) (plurality opinion). And by any measure, the Excessive Fines Clause is deeply rooted in our nation's legal tradition, making it an obvious candidate for incorporation.

Moreover, the question presented is especially pressing today. As disagreement among courts has deepened, fines and forfeitures have exploded at the state and local levels. Civil forfeiture in particular—

the basis for this case—is now "widespread and highly profitable," causing "egregious and well-chronicled abuses." *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). State and local governments "have strong incentives to pursue forfeiture" in part because "many States permit 100 percent of forfeiture proceeds to flow directly to law enforcement." *Id.* Additionally, prosecutors enjoy procedural advantages in civil-forfeiture cases—for example, no criminal conviction is needed, the standard of proof is lower than in criminal cases, and property owners have no right to appointed counsel. And in Indiana, prosecutors sometimes have a *personal* financial stake in civil forfeiture because in many cases—including this one—the government farms out forfeiture prosecutions to private lawyers on a contingency-fee basis. The impulse to use economic sanctions "for raising revenue in unfair ways" could hardly be stronger. *See Browning-Ferris Indus.*, 492 U.S. at 272.

This Court has recognized that the Excessive Fines Clause is an essential check on the government's tendency to "use[ ] the civil courts to extract large payments or forfeitures for the purpose of raising revenue." *Id.* at 275. But that protection carries little weight if state courts can "decline" to apply it, as the Indiana Supreme Court did here. *See* App. 9. Only this Court can resolve the inherently national question whether the Excessive Fines Clause is incorporated

against all 50 States. Because this case is an ideal vehicle for doing so, the Court should grant certiorari.

OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported at 84 N.E.3d 1179. *See* App. 1-12. The opinion of the Indiana Court of Appeals is reported at 62 N.E.3d 472. *See* App. 13-26. The opinions of the Grant County Superior Court are unpublished, but included in the Appendix at App. 27-34.

JURISDICTION

The Indiana Supreme Court entered judgment on November 2, 2017. *See* App. 1. Petitioners request a writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. After his father died, in the winter of 2012, Petitioner Tyson Timbs ("Petitioner") received around $73,000 in life-insurance proceeds. He used $41,558.30 to buy a car—the Land Rover LR2 at issue in this case.

At the time, Petitioner had recently moved to Marion, Indiana, to live with an aunt while he worked on rebuilding his life. Back home in St. Mary's, Ohio, he had become addicted to hydrocodone—an opioid medication prescribed to him for a work-related injury. When he could no longer find pills on the street, he began using heroin.

For a short time in Marion, Petitioner overcame his addiction. But following his father's death, he began using heroin again. With a new Land Rover and more than $31,000 left to spend, Petitioner began driving the vehicle to Richmond, Indiana, and Ohio—sometimes on a daily basis—to buy heroin for his personal use.

His money soon ran out, and Petitioner began looking for new ways to fund his addiction. With the help of a confidential informant, he arranged several drug transactions with undercover officers. On the first such occasion, Petitioner drove across Marion in

the Land Rover and sold officers two grams of heroin for $225. Hrg. Tr. 26:25-27:02 (July 15, 2015). A few days later, he walked from his aunt's house to a nearby gas station, where he sold officers another two grams for $160. Hrg. Tr. 29:16-29:20. While driving to a third transaction, Petitioner was pulled over and arrested. No drugs were found in the vehicle (apart from a prescription pill in the pocket of Petitioner's traveling companion). The Land Rover was seized.

The State of Indiana charged Petitioner with two counts of dealing in a Schedule I controlled substance (a class B felony, *see* Ind. Code § 35-48-4-2(a)(1)(C)) and one count of felony conspiracy to commit theft (a class D felony, *see id.* § 35-43-4-2(a)).[1]

Petitioner pleaded guilty to one count of dealing and to the count of conspiracy to commit theft. The trial court sentenced him to six years, with the first year to be served in home detention and the remaining five years on probation. Petitioner agreed to attend an addiction-treatment program under court supervision. He also agreed to pay police costs of $385, an interdiction fee of $200, court costs of $168, a bond fee of $50,

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[1] In a post-arrest interview, detectives asked why Petitioner and his companion had no heroin in the Land Rover at the time of their arrest, given they were traveling to a meeting at which undercover officers expected to buy heroin. Petitioner told them, "we thought about maybe just pulling up and, if he would've gave me the money, just driving away . . . I'm not really sure what we were going to do." State's Trial Ex. 1 at 19:23-20:00, 21:03-21:25. These statements appear to have been the basis for Petitioner's theft charge.

and a $400 fee for undergoing a drug-and-alcohol assessment with the probation department.

2. Several months after Petitioner's arrest, a private law firm filed a case to forfeit his vehicle on behalf of the State. The complaint "referred only to May 31, 2013"—the date on which Petitioner was arrested while driving to the unconsummated third transaction with officers. *See* App. 21.

Following Petitioner's conviction, the trial court held an evidentiary hearing on the State's forfeiture request. The court found that Petitioner purchased the Land Rover legally using life-insurance proceeds but used the vehicle to "transport . . . heroin back to Marion." App. 28 ¶¶ 2-3. Based on the record, the court determined that forfeiture would be "grossly disproportional to the gravity of [Petitioner's] offense" and thus unconstitutional under the Eighth Amendment's Excessive Fines Clause, App. 29-30 ¶¶ 6-9. "While the negative impact on our society of trafficking in illegal drugs is substantial," the court acknowledged, "a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to [Petitioner's] illegal conduct." App. 30 ¶ 9.

3. A divided panel of the Indiana Court of Appeals affirmed. App. 13-26. The court concluded that "[t]he United States Supreme Court has yet to hold that the Excessive Fines Clause is applicable to the States." App. 17-18 n.4 (citing *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989)). Based on its own precedent, however, the court held

that the Clause applies in state forfeiture proceedings. App. 17-18 n.4 (citing *$100* v. *State*, 822 N.E.2d 1001, 1011 (Ind. Ct. App. 2005)).

After conducting the proportionality assessment required under this Court's excessive-fines precedent, the court of appeals affirmed that forfeiture of Petitioner's vehicle would be unconstitutionally excessive. App. 20 (citing *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998)). The court compared the value of the Land Rover (about $40,000) to the maximum criminal penalty that could be imposed for Petitioner's offense ($10,000). App. 20-21.[2] The court considered the "financial burdens [that] had already been imposed on [Petitioner] when he pleaded guilty." App. 21. It further concluded that the State's request for forfeiture was based on a single, unconsummated sale of heroin on May 31, 2013. App. 21. "If the State wished to seek forfeiture of the Land Rover based on [Petitioner's] other criminal acts," the court reasoned, "it should have done so more clearly in its forfeiture complaint." App. 21-22. Regardless, the court observed, "the only evidence before the trial court was that [Petitioner] sold heroin twice, both times as a result of controlled buys." *See* App. 22 (noting that "[t]he remaining times he transported heroin, it was apparently for his own use"). Based on this record, the court affirmed that

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[2] Indiana sets a uniform $10,000 maximum fine for every class of felony. *See* Ind. Code §§ 35-50-2-4 to -7.

"[f]orfeiture of the Land Rover . . . was grossly disproportionate to the gravity of [Petitioner's] offense." App. 24.[3]

4. The Indiana Supreme Court granted review and unanimously reversed. App. 1-12. Surveying decisions that have addressed the incorporation of the Excessive Fines Clause, App. 5-7, the court concluded that this Court "has never held that the States are subject to the Excessive Fines Clause," App. 5. Given the "lack of clear direction from the Supreme Court," the court "decline[d] to find or assume incorporation." App. 8. Because this Court has not "decide[d] the issue authoritatively," the Indiana Supreme Court believed that no incorporation analysis was warranted. App. 8. Citing Indiana's status as "a sovereign state within our federal system," the court held that it would not "impose federal obligations on the State that the federal government itself has not mandated." App. 9.

The Indiana Supreme Court acknowledged that its holding broke from the weight of authority. *See* App. 8. The court further acknowledged that "our colleagues on the Court of Appeals and the trial court may be correct in foretelling where the Supreme Court will one

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[3] The dissenting court-of-appeals judge agreed that "the Excessive Fines Clause of the Eighth Amendment may come into play in a forfeiture case," App. 25, but disagreed that forfeiture of Petitioner's Land Rover would be excessive, App. 26. Like the trial court, the court-of-appeals majority addressed the Excessive Fines Clause alone, noting that Petitioner did not raise the separate protection against excessive fines under the Indiana Constitution. *See* App. 18 n.4 (citing Ind. Const. art. I, § 16).

day lead on whether to apply the Clause to the States." App. 9-10. Nonetheless, the court declined to apply the Excessive Fines Clause absent further instruction from this Court.

REASONS FOR GRANTING THE PETITION

Four Terms ago, this Court remarked—correctly—that all three Clauses of the Eighth Amendment apply to the States: "The Eighth Amendment provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,'" and "[t]he Fourteenth Amendment applies those restrictions to the States." *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014). The Court has reaffirmed the same principles on a half-dozen other occasions: in 2008, *Kennedy* v. *Louisiana*, 554 U.S. 407, 419; *Baze* v. *Rees*, 553 U.S. 35, 47 (plurality opinion); in 2005, *Roper* v. *Simmons*, 543 U.S. 551, 560; in 1991, *Harmelin* v. *Michigan*, 501 U.S. 957, 962 (opinion of Scalia, J.); in 1988, *Thompson* v. *Oklahoma*, 487 U.S. 815, 819 n.1 (plurality opinion); and in 1987, *Booth* v. *Maryland*, 482 U.S. 496, 501 n.5, *overruled on other grounds*, *Payne* v. *Tennessee*, 501 U.S. 808 (1991). Put simply, "the Fourteenth Amendment . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus.* v. *Leatherman Tool Grp.*, 532 U.S. 424, 433-34 (2001).

The Indiana Supreme Court nonetheless concluded that this Court has been insufficiently "definitive" on the incorporation of the Excessive Fines Clause. App. 9. For that reason, it "decline[d] to find or assume incorporation until the Supreme Court decides the issue authoritatively." App. 8. The court reached this conclusion based on what it labeled "dicta" in *McDonald* v. *City of Chicago*—in which this Court addressed incorporation of the Second Amendment, not the Eighth. *See* App. 8-9. Indiana thus aligned itself with a growing minority of jurisdictions that decline to apply the Excessive Fines Clause when state and local authorities impose economic sanctions.

Given the surge in punitive fines and forfeitures at the state and local levels, the issue of the Clause's incorporation is more pressing now than ever. Only this Court can answer the inherently national question of incorporation, and this case presents the ideal vehicle for resolving that question.

I. The Indiana Supreme Court's decision deepens an existing conflict over whether the Excessive Fines Clause applies to the States.

The Indiana Supreme Court's decision turned on what it called a "lack of clear direction" from this Court. App. 8. While acknowledging that other courts "have either applied the Excessive Fines Clause to challenged state action or assumed without deciding that the Clause applies," the court elected to "await

guidance" from this Court. App. 8. This decision deepens an existing split over whether state courts are required to enforce the federal protection against excessive fines under the Eighth and Fourteenth Amendments.

In large part, this growing divide stems from what state courts—and lower federal courts—have perceived as mixed signals from this Court. In 1989, for example, this Court suggested that it had yet to "decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment." *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22. Twelve years later, however, the Court remarked that "the Due Process Clause of the Fourteenth Amendment . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus.*, 532 U.S. at 433-34. But in 2010, the Court noted that "[w]e never have decided whether . . . the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause." *McDonald* v. *City of Chicago*, 561 U.S. 742, 765 n.13. At other times, the Court has observed that all three Clauses of the Eighth Amendment apply to the States equally. *See, e.g.*, *Hall*, 134 S. Ct. at 1992; *Kennedy*, 554 U.S. at 419; *Baze*, 553 U.S. at 47 (plurality opinion).

These conflicting statements have left state and federal courts split, leading to "a surprising amount of confusion as to whether the Excessive Fines Clause has been incorporated against the states." *Reyes* v. *N.*

Tex. Tollway Auth., 830 F. Supp. 2d 194, 206 (N.D. Tex. 2011). The majority of courts that have addressed the issue have applied the Clause to the States (Section A, *infra*). A lopsided minority—now including Indiana—have declined to do so (Section B, *infra*).

A. Two Circuits and at least 14 state high courts apply the Excessive Fines Clause to the States.

The Eighth and Ninth Circuits have applied the Excessive Fines Clause to the States. So, too, have the high courts of Alabama, California, Delaware, Georgia, Idaho, Illinois, Kentucky, Massachusetts, Minnesota, Nevada, Ohio, Pennsylvania, Utah, and West Virginia.

These courts view the matter as beyond serious dispute. In *Qwest Corp.* v. *Minnesota Public Utilities Commission*, 427 F.3d 1061 (8th Cir. 2005), for example, the Eighth Circuit reviewed a local exchange carrier's challenge to a state agency's $25.95-million penalty. Drawing on *Cooper Industries*, the court held that "[t]he Eighth Amendment's prohibition of excessive fines applies to the states through the Due Process Clause of the Fourteenth Amendment." *Id.* at 1069 (citing *Cooper Indus.*, 532 U.S. at 433-34). Likewise in *Wright* v. *Riveland*, 219 F.3d 905 (9th Cir. 2000), the Ninth Circuit held that a Washington statute authorizing deduction of inmate funds "is punitive and subject to Eighth Amendment scrutiny" under the Excessive Fines Clause. *Id.* at 915. And two other

Circuits—the Fifth and the Seventh—have frequently remarked on the "open question" of incorporation before forging ahead on the assumption that the Excessive Fines Clause applies to the States. *Simic* v. *City of Chicago*, 851 F.3d 734, 739 (7th Cir. 2017); *see also Cripps* v. *La. Dep't of Agric. & Forestry*, 819 F.3d 221, 234 (5th Cir.), *cert. denied*, 137 S. Ct. 305 (2016); *Disc. Inn, Inc.* v. *City of Chicago*, 803 F.3d 317, 319-20 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1209 (2016); *Vanderbilt Mortg. & Fin.* v. *Flores*, 692 F.3d 358, 374 & n.14 (5th Cir. 2012); *Broussard* v. *Par. of Orleans*, 318 F.3d 644, 652 (5th Cir. 2003).[4]

At the state-court level—where judicial review of state and local fines normally occurs—at least 14 state courts of last resort have applied the Excessive Fines Clause to the States:

Alabama. The Alabama Supreme Court holds that "[t]he forfeiture provisions of our Code are subject to the Excessive Fines Clauses of the Alabama Constitution, Art. I, § 15, and the Eighth Amendment to the

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[4] The Tenth Circuit appears to have taken both sides of the issue. In 1998, the court analyzed the forfeiture of a state pension under the Excessive Fines Clause, rejecting the constitutional claim without commenting on incorporation. *See Hopkins* v. *Okla. Pub. Emps. Ret. Sys.*, 150 F.3d 1155, 1162-63. But, in a recent unpublished decision, the court affirmed the dismissal of a *pro se* appeal in part because "the Excessive Fines Clause has never been incorporated by the Fourteenth Amendment and applied to the states." *Garcia* v. *Wyoming*, 587 F. App'x 464, 469 (10th Cir. 2014).

United States Constitution." *Ex parte Kelley*, 766 So. 2d 837, 840 (Ala. 1999).

California. The California Supreme Court likewise recognizes that "[t]he Due Process Clause of the Fourteenth Amendment to the Federal Constitution . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420 (Cal. 2005), *as modified* (Jan. 18, 2006) (quoting *Cooper Indus.*, 532 U.S. at 433-34).

Delaware. Answering certified questions, the Delaware Supreme Court has held that "it is clear that civil forfeitures imposed pursuant to Delaware law are subject to the constraints of the Excessive Fines Clause of the Eighth Amendment." *In re 1982 Honda*, 681 A.2d 1035, 1039 (Del. 1996).

Georgia. Answering certified questions, the Georgia Supreme Court has held that "[t]he prohibition against excessive fines of the Eighth Amendment does apply to civil in rem forfeitures under [the State's civil-forfeiture law]." *Thorp* v. *State*, 450 S.E.2d 416, 417 (Ga. 1994), *abrogated on other grounds by Howell* v. *State*, 656 S.E.2d 511 (Ga. 2008).

Idaho. The Idaho Supreme Court "has decided that the Eighth Amendment's prohibition on 'excessive fines' applies to civil *in rem* forfeitures brought under [the State's civil-forfeiture law]." *Idaho State Police ex rel. Russell* v. *Real Prop.*, 156 P.3d 561, 564 (Idaho 2007).

Illinois. The Illinois Supreme Court holds that the Excessive Fines Clause applies to state-law forfeitures. *People ex rel. Waller* v. *1989 Ford F350 Truck*, 642 N.E.2d 460, 466 (Ill. 1994); *see also id.* ("[W]e remand with instructions for the circuit court to expressly consider and determine the excessive fine issue.").

Kentucky. The Kentucky Supreme Court has recognized that "a punitive forfeiture is subject to scrutiny to determine if it violates the 'excessive fines' clauses of the Eighth Amendment to the United States Constitution and section 17 of our Constitution, which contain identical language." *Commonwealth* v. *Fint*, 940 S.W.2d 896, 897-98 (Ky. 1997) (internal citation omitted).

Massachusetts. The Supreme Judicial Court of Massachusetts holds that "[t]he due process clause of the Fourteenth Amendment to the United States Constitution 'makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States.'" *Pub. Emp. Ret. Admin. Comm'n* v. *Bettencourt*, 47 N.E.3d 667, 672 n.7 (Mass. 2016) (quoting *Cooper Indus.*, 532 U.S. at 433-34).

Minnesota. The Minnesota Supreme Court has invalidated fines under "the Excessive Fines Clauses of the United States and Minnesota Constitutions" alike. *State* v. *Rewitzer*, 617 N.W.2d 407, 415 (Minn. 2000); *see also Wilson* v. *Comm'r of Revenue*, 656 N.W.2d 547, 557 (Minn. 2003).

Nevada. The Nevada Supreme Court holds that the Excessive Fines Clause places limits on state-law forfeitures. *Levingston* v. *Washoe Cty.*, 916 P.2d 163, 169 (Nev. 1996) ("While we conclude that excessive fines analysis applies to civil forfeiture actions, insufficient evidence was presented to the district court to determine whether [the government's] forfeiture of the 10th Street home violated the Excessive Fines Clause."), *opinion modified on reh'g on other grounds*, 956 P.2d 84 (Nev. 1998).

Ohio. The Ohio Supreme Court "hold[s] that forfeiture of property, pursuant to [the State's civil-forfeiture law], is a form of punishment for a specified offense and, therefore, is a 'fine' for purposes of Section 9, Article I of the Ohio Constitution and the Eighth Amendment to the United States Constitution." *State* v. *Hill*, 635 N.E.2d 1248, 1256 (Ohio 1994).

Pennsylvania. The Pennsylvania Supreme Court holds that "[t]he Eighth Amendment, and, specifically, the Excessive Fines Clause, is made applicable to the states through the Fourteenth Amendment to the United States Constitution." *Commonwealth* v. *1997 Chevrolet*, 160 A.3d 153, 162 n.7 (Pa. 2017) (citing *Cooper Indus.*, 532 U.S. at 433-34).

Utah. The Utah Supreme Court has recognized that "a forfeiture pursuant to [the State's civil-forfeiture law] is . . . subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *State* v. *A House*, 886 P.2d 534, 541 (Utah 1994); *see also State* v. *Real Prop.*, 994 P.2d 1254, 1256 (Utah 2000)

(invalidating forfeiture as excessive fine "on the basis of the United States Constitution alone").

West Virginia. The Supreme Court of Appeals of West Virginia holds that "[t]he Excessive Fines Clause of the U.S. Constitution is applicable to the states through the Fourteenth Amendment." *Vanderbilt Mortg. & Fin.* v. *Cole*, 740 S.E.2d 562, 570 n.10 (W. Va. 2013) (citing *Cooper Indus.*, 532 U.S. at 433-34); *see also Dean* v. *State*, 736 S.E.2d 40, 42 syl. 6 (W. Va. 2012).[5]

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[5] Intermediate appellate courts in at least nine other jurisdictions have applied the Excessive Fines Clause to the States. *Dami Hosp., LLC* v. *Indus. Claim Appeals Office*, No. 16CA0249, 2017 WL 710497, at *1 (Colo. App. Feb. 23, 2017), *cert. granted in part sub nom. Colo. Dep't of Labor & Emp.* v. *Dami Hosp., LLC*, No. 17SC200, 2017 WL 3977989 (Colo. Sept. 11, 2017) (agreeing to decide, among other questions, "[w]hether the protections of the Excessive Fines Clause of the Eighth Amendment apply to corporations"); *Agresta* v. *City of Maitland*, 159 So. 3d 876, 878 (Fla. Dist. Ct. App. 2015); *Davanne Realty* v. *Edison Twp.*, 972 A.2d 1164, 1167 (N.J. Super. Ct. App. Div. 2009), *aff'd*, 990 A.2d 639 (N.J. 2010); *In re Prop. of Flores*, 711 N.W.2d 733 (table), at *4 (Iowa Ct. App. 2006); *One Car* v. *State*, 122 S.W.3d 422, 423 n.2, 428 (Tex. App. 2003); *State* v. *Bergquist*, 641 N.W.2d 179, 180 (Wis. Ct. App. 2002); *State* v. *Leyva*, 985 P.2d 498, 504 (Ariz. Ct. App. 1998); *Tellevik* v. *Real Prop.*, 921 P.2d 1088, 1093-94 (Wash. Ct. App. 1996); *Attorney-Gen.* v. *One Green 1993 Four Door Chrysler*, 217 A.D.2d 342, 345 (N.Y. App. Div. 1996).

B. Indiana joins Montana, Mississippi, and the Michigan Court of Appeals in holding that the Excessive Fines Clause does not apply to the States.

The Indiana Supreme Court acknowledged parting ways with the weight of authority on the question presented. In so doing, the court aligned itself with a growing minority of jurisdictions that have written off the nationwide force of the Excessive Fines Clause.

In a civil-forfeiture case, like this one, the Montana Supreme Court refused to treat the Excessive Fines Clause as incorporated against the States. *State* v. *2003 Chevrolet Pickup*, 202 P.3d 782, 783 (Mont. 2009). Reasoning that this Court has not clearly incorporated the Clause, the Montana Supreme Court declined to "hold that the Eighth Amendment to the federal constitution is applicable to Montana, when the federal courts have not done so." *Id.*

The Mississippi Supreme Court has taken a similar approach. Relying on a decision that predates the Fourteenth Amendment, that court has twice remarked that "[t]he United States Supreme Court has never held that the Excessive Fines Clause of the Eighth Amendment is applicable to the states." *One (1) Charter Arms, Bulldog 44 Special* v. *State ex rel. Moore*, 721 So. 2d 620, 623 (Miss. 1998) (citing *Pervear* v. *Commonwealth*, 72 U.S. 475 (1866) and *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958), *overruled by Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964)); *One (1) 1979 Ford 15V* v. *State ex rel. Miss. Bureau of Narcotics*, 721

So. 2d 631, 634 (Miss. 1998). For this reason, Mississippi courts evaluate excessive-fines defenses using a unique state constitutional test. *See Galloway* v. *City of New Albany*, 735 So. 2d 407, 412 (Miss. 1999) (discussing four-part test); *One 2011 Chevrolet Silverado 1500* v. *Panola Cty. Narcotics Task Force*, 169 So. 3d 967, 970 (Miss. Ct. App. 2014) (same).

Michigan's lower courts have likewise rejected incorporation. Although the Michigan Supreme Court has not considered the issue, the intermediate court of appeals has three times declined to address properly raised arguments on the ground that "the United States Supreme Court has never determined that the Excessive Fines Clause is applicable to the states through the Fourteenth Amendment." *In re Forfeiture of $25,505*, 560 N.W.2d 341, 347 (Mich. Ct. App. 1996); *see also In re Forfeiture of 5118 Indian Garden Rd.*, 654 N.W.2d 646, 648 (Mich. Ct. App. 2002) (similar); *People* v. *Antolovich*, 525 N.W.2d 513, 515 (Mich. Ct. App. 1994) ("We decline to determine whether the $25,000 fine imposed violates the Eighth Amendment of the United States Constitution."). *But see People* v. *Castillo*, No. 243968, 2004 WL 243417, at *1 (Mich. Ct. App. Feb. 10, 2004) (non-precedential) ("[W]e note that the Supreme Court recently held that the Due Process Clause of the Fourteenth Amendment 'makes the Eighth Amendment's prohibition against excessive fines . . . applicable to the States.'"). Like the high courts of Indiana, Montana, and Mississippi, the Michigan Court of Appeals conducted no meaningful analysis of whether the Fourteenth Amendment

incorporates the Clause against the States. Rather, the court refused to apply the Clause based on the absence of a sufficiently definitive ruling from this Court.

In sum, the state courts taking the minority position have placed the onus on this Court to more clearly hold that the Excessive Fines Clause is incorporated. All of these courts—like the Indiana Supreme Court in this case—have decided that they will not enforce excessive-fines defenses under the Eighth Amendment until this Court decides the question presented.

II. The Indiana Supreme Court's decision conflicts with this Court's precedent.

Review is also warranted because the Indiana Supreme Court's decision conflicts with this Court's incorporation precedent. By any measure, the Eighth Amendment's protection against excessive fines is deeply rooted in our nation's legal tradition, making it a clear candidate for incorporation. By declining to apply the Clause, the Indiana Supreme Court thus broke with this Court's precedent at a fundamental level. The court compounded that error by failing to undertake the incorporation analysis. By "await[ing] guidance" from this Court, App. 8, the Indiana Supreme Court neglected its "coordinate responsibility" to determine whether the Clause protects people like Petitioner from excessive fines imposed by state and local authorities, *see Howlett* v. *Rose*, 496 U.S. 356, 367 (1990).

1. The Excessive Fines Clause applies to the States under a straightforward application of this Court's precedent. Along with the other Civil War Amendments, the Fourteenth Amendment "fundamentally altered our country's federal system." *McDonald*, 561 U.S. at 754. And under the selective-incorporation doctrine, "almost all of the provisions of the Bill of Rights" apply not just to the federal government, but to the States and municipalities as well. *Id.* at 764; *see also id.* ("The Court . . . shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause."). In determining whether one of the Bill of Rights' provisions applies to the States, the Court asks whether the right in question "is fundamental to our scheme of ordered liberty," *id.* at 767 (emphasis omitted), and, relatedly, whether it "is 'deeply rooted in this Nation's history and tradition,'" *id.* (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997)). Unsurprisingly, virtually all of the rights the Framers enshrined in the first eight amendments satisfy this test.

The Eighth Amendment's protection against excessive fines is no different. On at least seven occasions, this Court has said that the Clause applies to the States by way of the Fourteenth Amendment.[6] Like the protections against "cruel and unusual punishments" and "excessive bail"—which the Court long ago applied

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[6] *Hall*, 134 S. Ct. at 1992; *Kennedy*, 554 U.S. at 419; *Baze*, 553 U.S. at 47 (plurality opinion); *Cooper Indus.*, 532 U.S. at 433-34; *Harmelin*, 501 U.S. at 962 (opinion of Scalia, J.); *Thompson*, 487 U.S. at 819 n.1 (plurality opinion); *Booth*, 482 U.S. at 501 n.5.

to the States—the Excessive Fines Clause "prevent[s] the government from abusing its power to punish." *Austin* v. *United States*, 509 U.S. 602, 607 (1993) (emphasis omitted). Together, the three Clauses "place[] limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." *Browning-Ferris Indus.*, 492 U.S. at 275. By working in harmony "to prohibit all excessive punishments," *Atkins* v. *Virginia*, 536 U.S. 304, 311 n.7 (2002), the Clauses secure Americans' life, liberty, and property, *see* U.S. Const. amend. XIV, § 1. There is thus "no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation." *Browning-Ferris Indus.*, 492 U.S. at 284 (O'Connor, J., concurring in part and dissenting in part). All three Clauses stand as "parallel limitations" securing the same unitary right to be free from disproportionate punishment. *See id.* at 263 (majority opinion); *cf. Trop* v. *Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

Like the rest of the Eighth Amendment, of course, the Excessive Fines Clause is also "deeply rooted" in our constitutional tradition. *See McDonald*, 561 U.S. at 767. At the time of ratification, "at least eight of the original States . . . had some equivalent of the Excessive Fines Clause in their respective Declarations of Rights or State Constitutions." *Browning-Ferris Indus.*, 492 U.S. at 264. The Eighth Amendment's language was borrowed from the Virginia

Declaration of Rights, which drew from the 1689 English Bill of Rights, which in turn declared that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689), *quoted in Browning-Ferris Indus.*, 492 U.S. at 266-67. Blackstone traced the constitutional protection against excessive fines back further still, to Magna Carta, and before that to the reign of Henry II. *See* 4 William Blackstone, Commentaries *372; *see generally McDonald*, 561 U.S. at 768 (looking to Blackstone and the English Bill of Rights to determine that the Second Amendment is incorporated).

The same mistrust of the government's power to punish inspired the Eighth Amendment. The "primary focus" of the Amendment "was the potential for governmental abuse of its 'prosecutorial' power," *Browning-Ferris Indus.*, 492 U.S. at 266, with the Excessive Fines Clause in particular "limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends," *id.* at 267. In adopting the Eighth Amendment, the Framers thus "uncritically claim[ed] a liberty of their heritage." *See* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 Harv. J.L. & Pub. Pol'y 119, 134 (2004). Relying on Anglo-American legal traditions, they recognized that economic sanctions can impose burdens no less punishing than incarceration; an excessive fine, after all, can "amount[] to imprisonment for life." 4 William Blackstone Commentaries *373. When the Fourteenth Amendment was ratified, in 1868, these

same concerns persisted. By that time, 35 state constitutions included protections against excessive fines. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 82 (2008); *cf. McDonald*, 561 U.S. at 769, 777 (looking to state constitutions during the periods surrounding ratification of the Bill of Rights and the Fourteenth Amendment to determine incorporation).

For these reasons, the Framers counted the protection against excessive fines as among those fundamental rights that are essential to our system of ordered liberty, and the Fourteenth Amendment's ratifiers intended that protection to apply to the States.

2. Like the courts of Montana, Mississippi, and Michigan, the Indiana Supreme Court took account of none of these principles. In that court's view, it was enough that this Court has not issued a "definitive holding" on the question of the Excessive Fines Clause's incorporation. App. 9. And because "Indiana is a sovereign state within our federal system," the court "elect[ed] not to impose federal obligations on the State that the federal government itself has not mandated." App. 9. Until this Court "decides the issue authoritatively," the Indiana Supreme Court thus announced that it would "decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." App. 8, 9 (emphasis in original).

Far from being "cautious," App. 8, this reasoning raises grave constitutional concerns in its own right. Our federal system "charges state courts with a coordinate responsibility" to give effect to all Americans' federally protected rights. *Howlett*, 496 U.S. at 367. This includes deciding whether federal constitutional provisions like the Excessive Fines Clause protect against penalties levied by state and local governments. For "the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Id.*; *see also Claflin* v. *Houseman*, 93 U.S. 130, 137 (1876) (explaining that federal and state courts both must enforce "the laws of the United States"). By declining to engage with this issue, the Indiana Supreme Court thus effectively "den[ied] a federal right." *Howlett*, 496 U.S. at 369.

By dismissing the Excessive Fines Clause as "a *federal* test" that could "impede development" of state law, App. 9, the Indiana Supreme Court also misunderstood the supremacy of the federal Constitution, *see* U.S. Const. art. VI, cl. 2. State courts—no less than federal courts—must give effect to the Constitution. And it is never the case that a constitutional protection should remain unincorporated simply to avoid interfering with state laws. *See McDonald*, 561 U.S. at 790 (plurality opinion) ("Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights."). Yet the Indiana Supreme Court's reasoning begins and ends with that flawed premise. *See* App. 9. The Court should thus grant certiorari, reaffirm the state courts' coordinate

duty to enforce federally protected rights, and hold that the Excessive Fines Clause is incorporated against the States.

III. The question presented raises issues of national importance that warrant this Court's review.

As suggested by the number of courts that have considered the question presented, *see* pp. 13-21, *supra*, whether the Excessive Fines Clause applies to the States is an important and recurring issue. It is important in all 50 States (and countless localities), which levy fines and forfeit property on a daily basis. And it is important to the many Americans every year targeted for punitive economic sanctions by state and local authorities. As the Indiana Supreme Court put it, only a "definitive holding" from this Court (App. 9) will guarantee that the Clause can act as a truly national counterweight to the "terrifying force of the criminal justice system." *Robertson* v. *United States ex rel. Watson*, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting from dismissal of certiorari). There is no reason to wait to resolve the question presented, and this case is the perfect vehicle in which to do so.

A. The Excessive Fines Clause is a key protection against punitive economic sanctions by States and municipalities.

The main evil addressed by the Excessive Fines Clause—like its precursors in the English Bill of

Rights and Magna Carta—is the sovereign impulse to "use[ ] the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." *See Browning-Ferris Indus.*, 492 U.S. at 275. This constitutional safety valve is as urgently needed today as ever. Particularly at the state and local levels, "many lawmakers use economic sanctions in order to avoid increasing taxes while maintaining governmental services, with some lawmakers even including increases to revenues generated from economic sanctions in projected budgets." Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. (forthcoming 2018) (footnotes omitted).

Like the Stuart practices that inspired the Excessive Fines Clause, modern economic sanctions also "target the politically vulnerable." *Id.* "Fines, fees, and forfeitures can have devastating consequences on those who are financially vulnerable, particularly in low-income communities and communities of color that are most likely to be heavily policed." Beth A. Colgan, "Fines, Fees, and Forfeitures" in *Reforming Criminal Justice – Volume 4: Punishment, Incarceration, and Release* 212 (Erik Luna ed. 2017) (footnote omitted). In Ferguson, Missouri, for example, the U.S. Department of Justice determined that "[c]ity officials have consistently set maximizing revenue as the priority for . . . law enforcement activity." U.S. Dep't of Justice, *Investigation of the Ferguson Police Department*, at 9 (Mar. 4, 2015). The roughly 3,000 residents of nearby Pagedale—five miles to the south of

Ferguson—have been fined for trivial offenses like missing curtains, aging paint, walking on the left side of crosswalks, and enjoying a beer within 150 feet of a grill. *See* George F. Will, *A Missouri town demands substantive due process*, The Wash. Post (Dec. 11, 2015), https://goo.gl/Jfq667. From 2010 to 2013, the number of non-traffic tickets in Pagedale increased 495%, with the city collecting $356,601 in associated fines and fees in 2013 alone. *Id.* In 2014, authorities issued nearly enough non-traffic tickets for each household within city limits to receive two. *See* Jennifer S. Mann, *Lawsuit filed against Pagedale for ticketing high grass and other code violations*, St. Louis Post-Dispatch (Nov. 4, 2015), https://goo.gl/Qmc86R.

In civil-forfeiture cases, like this case, the Excessive Fines Clause is a vitally important check on the government's impulse to punish disproportionately. In the majority of States and at the federal level, when property is forfeited most (and often all) of the resulting proceeds flow to law-enforcement coffers, frequently those of the seizing agency. As a result, state and federal agencies have increasingly resorted to civil forfeiture as a revenue-raising tool. In 2012 alone, agencies in 26 States and the District of Columbia took in more than $254 million through forfeiture. Institute for Justice, Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 11 (2d ed. 2015), https://goo.gl/sY32sT. (Between 2001 and 2014, total deposits in the Department of Justice and Treasury forfeiture funds approached $29 billion. *Id.* at 10.) Nationwide, the modern civil-forfeiture system "has

led to egregious and well-chronicled abuses." *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). And, like economic sanctions generally, forfeitures "frequently target the poor and other groups least able to defend their interests in forfeiture proceedings." *Id.*

Indiana vividly illustrates these national problems. As one prosecutor declared after law enforcement acquired a financial stake in civil forfeiture, "the statute is limited only by your own creativity." Joseph T. Hallinan, *Police can take crime cash but can't dish it out*, The Indianapolis Star, Feb. 2, 1986, at 6B. Moreover, Indiana's forfeiture system has inspired a unique set of abuses. Unlike every other State, Indiana allows local prosecutors to outsource their civil-forfeiture cases to private-sector lawyers on a contingency-fee basis. *See* Ind. Code § 34-24-1-8. Petitioner's case, for example, was prosecuted by a private law firm. *See* App'x of Appellant at 10-11, *State* v. *Timbs*, No. 27A04-1511-MI-1976 (Ind. Ct. App. filed Mar. 30, 2016) (complaint); *see generally* David P. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.01, at 1-13 (LexisNexis 2017) ("The biggest scandal of all is Indiana's institutionalized bounty hunter system in which state DAs contract with *private* attorneys to handle all of the county's civil forfeiture cases for a contingent fee of a quarter or a third of all the property they forfeit.").

This system of mercenary prosecutors only magnifies the Excessive Fines Clause's animating concern: that state power will be harnessed "for raising revenue in unfair ways, or for any other improper use."

Browning-Ferris Indus., 492 U.S. at 272. Predictably, private-sector lawyers pocket hundreds of thousands of dollars based on forfeitures. *See generally* Heather Gillers et al., *Cashing in on crime: Indiana law allows prosecutors to farm out forfeiture cases to private lawyers – who get a cut of the money*, The Indianapolis Star, Nov. 14, 2010, at A1. One deputy prosecutor litigated criminal cases while moonlighting as a contingency-fee lawyer in parallel forfeiture proceedings. "On numerous occasions when the ethics of the asset forfeiture procedures were called into question," the Indiana Supreme Court later found, "[the prosecutor] turned a blind eye and acted to protect his private interest in his continued pursuit of forfeiture property." *In re McKinney*, 948 N.E.2d 1154, 1155-56 (Ind. 2011). In the same county, a local trial court investigated the same system, which it termed "a carefully crafted assault on the judicial system and court adjudication of civil forfeitures." Findings and Report on Civil Drug Forfeitures in Division 2, Including a Limited Number of Cases in the Other Four Divisions of the Delaware Circuit Court, at 6 (Ind. Cir. Ct., Delaware Cty. Aug. 18, 2008), https://goo.gl/TCHk4S; *see also id.* at 13 ("The handling of civil drug forfeitures amounts to fraud on the court.").

Elsewhere in Indiana, a county council sued its local sheriff and prosecutor over their "respective roles in administering civil forfeiture proceedings, including most notably the handling of funds therefrom." *Knox Cty. Council* v. *Sievers*, 895 N.E.2d 1263, 1265 (Ind. Ct. App. 2008). As alleged in that case, the state auditing

agency "found a deficiency balance of $51,987.00 in the Drug Seizure Fund," *id.*, but law-enforcement officials refused to produce even basic information "concerning the financial aspects of [the county's] civil forfeiture proceedings," *id.* at 1266. And last year, a federal audit found that Indiana's Henry County and a neighboring police department misspent more than $300,000 in federal forfeiture money on "unallowable purchases" and "unallowable salary and fringe benefit costs." Office of the Inspector Gen., U.S. Dep't of Justice, *Audit of Henry County Sheriff's Office's Equitable Sharing Program Activities, New Castle, Indiana* at 4 (Feb. 2017), https://goo.gl/A56PuJ.

For ordinary citizens—many of them low-level drug offenders or innocent property owners—the real-world consequences are profound. With economic sanctions serving as both punishment and revenue source, "law enforcement Weapons of Mass Destruction" are increasingly deployed against "pedestrian targets." *Sargent* v. *State*, 27 N.E.3d 729, 735 (Ind. 2015) (Massa, J., dissenting). In one case, Indianapolis law enforcement sued to forfeit a teenager's car, which was found with "a large quantity of Gatorade bottles and assorted snacks and candies" stolen from a playground concession stand. *See* Pls.' Mot. Summ. J., *State* v. *Jaynes*, No. 49D01-1111-MI-043642, 2012 WL 12974140 (Ind. Super. Ct., Marion Cty. filed May 23, 2012). In another case, the State tried to forfeit a woman's 1996 Buick Century after she attempted to shoplift four iPhones. *Sargent*, 27 N.E.3d at 731. When the Indiana Supreme Court rejected that forfeiture on

statutory grounds, *see id.* at 733, even a dissenting justice voiced bewilderment at the State's "overreach," *id.* at 735 (Massa, J., dissenting); *see also id.* at 734 ("But really? Firing Sargent and having her righteously prosecuted for felony theft was not enough? The State had to take her car, too?").

The abuse of fines and forfeitures is not unique to Indiana. Nor is it new. The pressure to generate "royal revenue" is a well-recognized byproduct of any system of economic sanctions. *See Browning-Ferris Indus.*, 492 U.S. at 271. Unlike every other form of punishment—all of which cost the government money—"fines are a source of revenue." *Harmelin*, 501 U.S. at 978 n.9 (opinion of Scalia, J.). So "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Id.* Because "the State stands to benefit" from levying fines, *id.*, there is a singular risk that governments—federal, state, and local alike—will exercise their punitive powers with an eye toward revenue, rather than justice. The Excessive Fines Clause is an essential check on the many unjust punishments that can result from such perverse incentives. *Cf. McDonald*, 561 U.S. at 918 (Breyer, J., dissenting) (considering "the extent to which incorporation will further other, perhaps more basic, constitutional aims").

B. National uniformity is critical.

Few questions are more demanding of national resolution than which provisions of the Bill of Rights

apply to the several States. By setting a constitutional floor securing individual liberty, the Fourteenth Amendment "fundamentally restructured the relationship between individuals and the States." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring). That principle makes this Court's intervention particularly warranted in a case like this. As the Indiana Supreme Court recognized, this Court plays a unique role in deciding incorporation issues. *See* App. 8-9. All 50 States, as well as their residents, need to know which federal protections apply in state proceedings. In this way, every question of incorporation bears on the nation as a whole, and this Court alone can provide a nationwide answer.

Of course, the federal-state balance is not just "a matter of rights belonging only to the States." *Bond* v. *United States*, 564 U.S. 211, 222 (2011). It also "protects the liberty of the individual from arbitrary power," *id.*, with the Fourteenth Amendment "add[ing] greatly to the dignity and glory of American citizenship, and to the security of personal liberty," *Plessy* v. *Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting). To be a meaningful right of American citizenship, however, a right must have equal force throughout the nation. Today, the Eighth Amendment's protection against excessive fines applies in some places, but not others. The Clause protects people in Idaho, but not Montana; it protects people in Alabama, but not Mississippi; and—with the Indiana Supreme Court's decision in this case—it protects people in Illinois, but not Indiana.

By "elect[ing] not to impose federal obligations on the State," App. 9, the Indiana Supreme Court has also undermined the rights of people far beyond Indiana's borders. For instance, Indianapolis is home to one of the nation's central FedEx hubs,[7] which state and local law enforcement routinely comb for cross-country shipments of cash to seize. *See generally Bowman* v. *State*, 81 N.E.3d 1127, 1131 (Ind. Ct. App. 2017), *pet. for transfer pending* (holding parcel-seizure practices unlawful). In 2017 alone, Indianapolis prosecutors sued to forfeit—or to transfer to the federal government—over $1.5 million in currency seized in this fashion.[8]

With the Indiana Supreme Court's decision in this case, whether citizens fighting these seizures enjoy any protection under the Excessive Fines Clause depends on happenstance: whether a particular shipment is routed through Indiana and whether a prosecutor there decides to seek forfeiture in a state forum or a federal one. The prosecutor may elect to transfer the property to federal agencies for forfeiture under federal law, in which case the Clause would apply. *See generally* Office of the Att'y Gen., Order No. 3946-2017 (Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies) (July 19, 2017). Or the prosecutor may proceed in state court, in which case the Clause would not apply.

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[7] *See* Paris Lewbel, *Take a look inside Indy's FedEx hub, the second-largest in the U.S.*, Indy Channel (Dec. 15, 2017), https://goo.gl/g2wp41.

[8] This figure is derived from filings available on Indiana's online case-management system.

This situation calls out for correction. Federally protected rights should never depend on state borders, much less on how commercial carriers choose to route their shipments. "The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and all persons within those respective jurisdictions may invoke its protection." *Kennedy*, 554 U.S. at 412. Despite the Court's many statements to this effect, however, state courts and ordinary Americans are in need of a "definitive holding" on whether the Excessive Fines Clause applies to the States. *See* App. 9.

C. This case is a good vehicle for deciding the question presented.

This case offers an excellent vehicle for resolving the question presented. The Excessive Fines Clause was the sole basis for the decisions of the trial court, App. 27-30, and court of appeals, App. 13-26. Both courts believed that the Clause was incorporated and so they applied the Clause and ruled in Petitioner's favor on the merits, holding that forfeiture of his vehicle would be "grossly disproportionate to the gravity of [his] offense." App. 24, 29-30. The Indiana Supreme Court did not consider whether the lower courts correctly applied the Clause, however. App. 4 ("Before addressing whether forfeiture of Timbs's Land Rover would be an excessive fine, we must decide the antecedent question of whether the Excessive Fines Clause applies to forfeitures by the State."). Instead, the state

high court reversed on one ground: This Court has not "authoritatively" held that the Clause applies to the States. App. 8. That decision turned on no factual findings or matters of state law. And, like the lower courts in *Austin*, the Indiana Supreme Court "had no occasion to consider what factors should inform [the Eighth Amendment analysis] because it thought it was foreclosed from engaging in the inquiry." *See Austin*, 509 U.S. at 622. The incorporation question could not be more cleanly presented.

Nor is there any reason to delay addressing the issue, which this Court raised nearly three decades ago. *See Browning-Ferris Indus.*, 492 U.S. at 276 n.22. Further percolation serves little purpose. Every court that has dealt with this issue has (tacitly or expressly) looked to this Court for guidance. The courts that apply the Clause to the States do so because they view this Court's prior statements as commanding incorporation. *See supra* pp. 13-18. Conversely, those courts that decline to apply the Clause have read the very same statements and concluded they leave the incorporation issue unsettled. *See supra* pp. 19-21. Those courts taking the minority position—Montana, Mississippi, the Michigan Court of Appeals, and now Indiana—have not analyzed whether the Clause applies to the States under this Court's incorporation precedent. Rather, like Indiana, they have decided that, until this Court issues a "definitive holding," they will "elect not to impose federal obligations on the State that the federal government itself has not mandated." *See* App. 9.

This Court should grant review, hold that the Excessive Fines Clause applies to the States, and reaffirm that state courts—like the federal courts—bear "the duty to safeguard and enforce the right of every citizen." *Howlett*, 496 U.S. at 368 (quoting *Minneapolis & St. L.R. Co.* v. *Bombolis*, 241 U.S. 211, 222 (1916)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the
Indiana Supreme Court

No. 27S04-1702-MI-70

STATE OF INDIANA,

Appellant (Plaintiff below),

v.

TYSON TIMBS,

Appellee (Defendant below).

Appeal from the Grant Superior Court 1,
No. 27D01-1308-MI-92
The Honorable Jeffrey D. Todd, Judge

On Petition to Transfer from the Indiana Court
of Appeals, No. 27A04-1511-MI-1976

November 2, 2017

Slaughter, Justice.

The State sought to forfeit Defendant's Land Rover after he used it to transport illegal drugs. The trial court held the proposed forfeiture would violate the Eighth Amendment's Excessive Fines Clause. We conclude the Excessive Fines Clause does not bar the State from forfeiting Defendant's vehicle because the United States Supreme Court has not held that the Clause applies to the States through the Fourteenth Amendment.

Factual and Procedural History

Defendant, Tyson Timbs, used life-insurance proceeds after his father's death to pay $42,058.30 for a Land Rover in January 2013. Over the next four months, Timbs regularly drove the Land Rover between Marion and Richmond, Indiana, to buy and transport heroin. Timbs's trafficking came to the attention of a confidential police informant, who told a member of the Joint Effort Against Narcotics team that he could buy heroin from Timbs. Police set up a controlled buy, and the informant and an undercover detective bought two grams of heroin from Timbs for $225. Police made another controlled buy a couple of weeks later, acquiring another two grams of heroin for $160. During the second buy, the detective set up a third controlled buy with Timbs. The day the third buy was to occur, police apprehended Timbs during a traffic stop. The Land Rover had 1,237 miles on its odometer when

Timbs bought it in January, and more than 17,000 miles when police seized the vehicle in late May.

In June 2013, the State charged Timbs with two counts of Class B felony dealing in a controlled substance and one count of Class D felony conspiracy to commit theft. Nearly two years later, in 2015, Timbs pleaded guilty to one count of Class B felony dealing and one count of Class D felony conspiracy to commit theft in exchange for the State's dismissing the remaining charge. The trial court accepted the plea and sentenced Timbs to six years, with one year executed in community corrections and five years suspended to probation. Timbs also agreed to pay police costs of $385, an interdiction fee of $200, court costs of $168, a bond fee of $50, and a $400 fee for undergoing a drug-and-alcohol assessment with the probation department.

Within a couple months of bringing criminal charges, the State also sought to forfeit the Land Rover. After a bench trial, the court issued written findings that denied the State's action, concluding that forfeiture would be an excessive fine under the Eighth Amendment. "The amount of the forfeiture sought is excessive, and is grossly disproportional to the gravity of the Defendant's offense." The trial court observed that the maximum statutory fine for Timbs's Class B felony was $10,000 on the day he was arrested and noted the vehicle was worth approximately four times this amount when he bought it just a few months earlier. The court made no finding about the vehicle's value on Timbs's arrest date. Based on its holding, the

court ordered the State to release the vehicle immediately. A divided Court of Appeals affirmed. *State v. Timbs*, 62 N.E.3d 472 (Ind. Ct. App. 2016). We granted transfer, thus vacating the Court of Appeals' opinion, and now reverse.

Standard of Review

Before addressing whether forfeiture of Timbs's Land Rover would be an excessive fine, we must decide the antecedent question of whether the Excessive Fines Clause applies to forfeitures by the State. Whether a Bill of Rights provision applies to the States is a purely legal question. We review such questions de novo. *State v. Harper*, 8 N.E.3d 694, 696 (Ind. 2014). Unlike legal questions, a trial court's factual determinations are reviewed for clear error. *Fischer v. Heymann*, 12 N.E.3d 867, 870 (Ind. 2014). We will not reweigh evidence or determine the credibility of witnesses, and we will consider only the evidence favorable to the judgment and the logical inferences drawn from it. Ind. Trial Rule 52(A); *Hitch v. State*, 51 N.E.3d 216, 226 (Ind. 2016).

Discussion and Decision

I. The United States Supreme Court has never enforced the Excessive Fines Clause against the States, and we opt not to do so here.

The framers' original conception was settled long ago that the Bill of Rights applies only to the national government and cannot be enforced against the States.

See Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833). Only after ratification of the Fourteenth Amendment did the Supreme Court, in the early twentieth century, begin to apply various provisions of the Bill of Rights to the States through the doctrine of selective incorporation. Justice Black's argument for total incorporation of the Bill of Rights, *see, e.g.*, *Adamson v. California*, 332 U.S. 46, 71-72, 89 (1947) (Black, J., dissenting), has never carried the day. *McDonald v. City of Chicago*, 561 U.S. 742, 761-63 (2010).

To date, the Supreme Court has incorporated most of the first eight amendments – with a few notable exceptions: the Third Amendment's protection against quartering soldiers, the Fifth Amendment's grand-jury requirement, and the Seventh Amendment's right to a civil jury trial. *Id.* at 765 n.13 (citations omitted). At issue here is whether the Eighth Amendment's Excessive Fines Clause is enforceable against the States. We hold it is not.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Supreme Court has never held that States are subject to the Excessive Fines Clause. The Court initially declined to decide the Clause's incorporation status.

> Because of the result we reach today, we need not answer several questions that otherwise might be necessarily antecedent to finding the

> Eighth Amendment's Excessive Fines Clause applicable to an award of punitive damages, . . . [including] whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment[.]

Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989).

A dozen years later, in a case involving not a fine but another punitive-damages award, the Supreme Court stated in dictum that the Fourteenth Amendment's Due Process Clause "makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001) (citing *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam)). A prominent treatise on criminal procedure observed that *Cooper*'s statement incorporating the Excessive Fines Clause was merely dictum. "In noting that the due process clause also incorporated the Eighth Amendment prohibitions against excessive fines and cruel and unusual punishments, the Court cited *Furman v. Georgia*, . . . which involved an application of the prohibition against cruel and unusual punishments." Wayne R. Lafave et al., Criminal Procedure § 2.6(b), n.45 at 833 (4th ed. 2015).

Despite *Cooper*'s 2001 dictum that the Clause can be enforced against States, the Supreme Court's most recent pronouncement on this subject, in 2010, suggests the Clause has not been incorporated after all. *McDonald*, 561 U.S. at 765 n.13. *McDonald* was an

incorporation case. At issue was whether the Second Amendment's individual right to keep and bear arms, recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), is enforceable against the States. *McDonald* held that it is – a position commanding the support of five Justices, four of whom agreed it was enforceable through the Due Process Clause. Only Justice Thomas believed the basis for decision should be the Privileges and Immunities Clause. *McDonald*, 561 U.S. at 805-58 (Thomas, J., concurring in part and in the judgment). En route to deciding that the Second Amendment applies to the States, *McDonald* observed that "[o]nly a handful of the Bill of Rights protections remain unincorporated", *id.* at 765, and included on that list "the Eighth Amendment's prohibition on excessive fines." *Id.* at 765 n.13. Citing only *Browning-Ferris* and not *Cooper*, the Court stated, "We have never decided whether the . . . Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause." *Id.*

It is not self-evident why the *McDonald* Court did not mention *Cooper*. Perhaps the omission was an oversight, though we will not conclude lightly that the Supreme Court whiffed on the existence or meaning of its precedent. The more likely explanation is that *McDonald* was treating *Cooper*'s statement as superfluous to *Cooper*'s holding and therefore dictum. Just as *Cooper*'s statement that the Excessive Fines Clause is enforceable against the States is dictum, so too is *McDonald*'s statement that the Clause is not.

So where does that leave us? Given the lack of clear direction from the Supreme Court, we have a couple of options. One option is to ignore *McDonald* and follow the lead of some courts that have either applied the Excessive Fines Clause to challenged state action or assumed without deciding that the Clause applies. *See, e.g.*, *Hamilton v. City of New Albany, Indiana*, ___ Fed. Appx. ___, 2017 WL 2615453, at *5 (7th Cir. Jun. 16, 2017) (vacating summary judgment for city on plaintiff's federal excessive-fines claim and remanding for trial without mentioning incorporation or *McDonald*); *Cripps v. Louisiana Dep't of Agriculture and Forestry*, 819 F.3d 221, 234 (5th Cir. 2016) ("Assuming *arguendo* that the Excessive Fines Clause applies, the record indicates that each of Plaintiffs' offenses resulted in fines that do not exceed the limits prescribed by the statute authorizing it."); *Discount Inn, Inc. v. City of Chicago*, 803 F.3d 317, 320 (7th Cir. 2015) (holding that "the fines imposed by the challenged [city] ordinances are not excessive even if the 'excessive fines' clause is applicable"); *Public Employee Retirement Admin. Comm'n v. Bettencourt*, 47 N.E.3d 667, 672 n.7, 681 (Mass. 2016) (holding forfeiture violates federal excessive-fines clause based on *Cooper* without mentioning *McDonald*).

A second option is to await guidance from the Supreme Court and decline to find or assume incorporation until the Supreme Court decides the issue authoritatively. We choose this latter, more cautious approach for two reasons. First, although the Supreme Court has addressed this issue only in dicta, its

statement in *McDonald* that the Clause has not been incorporated is entitled to more weight because it is the Court's most recent. Second, Indiana is a sovereign state within our federal system, and we elect not to impose federal obligations on the State that the federal government itself has not mandated. An important corollary is that Indiana has its own system of legal, including constitutional, protections for its citizens and other persons within its jurisdiction. Absent a definitive holding from the Supreme Court, we decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution.

Although we ultimately disagree with our Court of Appeals' decision to apply the Excessive Fines Clause to the State's forfeiture, we understand the Court's reason for doing so. After all, the State specifically advised the Court that it "need not decide [the issue of incorporation] . . . because the penalties imposed were not unconstitutionally excessive." Despite the State's choice not to wage the incorporation battle here, we need not abide a party's consent to a misstatement or misapplication of law. *Stephenson v. State*, 864 N.E.2d 1022, 1030 (Ind. 2007). We reserve to ourselves – not the parties – the prerogative to pronounce what law governs a particular dispute. The parties' consensus here to subject the State's forfeiture to review under the Clause does not require that we follow su[illegible] And we decline to do so, mindful that our colleagues on the Court of Appeals and the trial court may be correct in

foretelling where the Supreme Court will one day lead on whether to apply the Clause to the States.

To be clear, our decision on incorporation should not be read to prejudge the merits of pending or prospective forfeiture challenges based on *other* provisions of state or federal law. Our narrow holding here is confined to the Court of Appeals' reliance on a provision of the United States Constitution – the Excessive Fines Clause – that the Supreme Court has never enforced against the States. We decline to address other potential problems with the State's forfeiture because Timbs raised only an excessive-fines challenge under federal law.

II. Based on the trial court's findings, the State proved it is entitled to forfeit the Land Rover.

Because we have resolved the Eighth Amendment issue against Timbs, we turn to whether the State proved its entitlement to forfeit the vehicle under Indiana law. The governing statute provides, in pertinent part, that to obtain forfeiture the State must show that a person used the vehicle to transport an illicit substance listed in the statute for the purpose of dealing or possessing the substance.

> Sec. 1. (a) The following may be seized:
>
> (1) All vehicles . . . , if they are used . . . by the person . . . in possession of them to transport . . . the following:

> (A) A controlled substance for the purpose of committing . . . any of the following:
>
> (i) Dealing in or manufacturing cocaine or a narcotic drug (IC 35-48-4-1)
>
> * * *
>
> (iii) Dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2)
>
> * * *
>
> (vii) Possession of cocaine or a narcotic drug (IC 35-48-4-6)

I.C. § 34-24-1-1 (Supp. 2012). *See also Katner v. State*, 655 N.E.2d 345, 349 (Ind. 1995).

After a bench trial, the trial court made the following factual findings relevant here.

> Between the date of purchase, and May 31st, 2013, [Timbs] drove the vehicle frequently from Marion to Richmond to purchase heroin. The Land Rover was used by [Timbs] to transport heroin back to Marion. [Timbs] both used and sold the heroin. When the Land Rover was seized by the State at the end of May 2013, the odometer reading was between 17,000 and 18,000 miles. The increased mileage primarily resulted from [Timbs] traveling between Marion and Richmond to engage in illegal drug trafficking.

On appeal, Timbs challenges these findings under the corpus-delicti rule, which requires independent evidence of a crime beyond the defendant's confession. But the rule applies only to an *out-of-court* confession in a *criminal* proceeding and thus does not benefit Timbs. *See Willoughby v. State*, 552 N.E.2d 462, 466 (Ind. 1990). Timbs's inculpatory testimony occurred *in court*, while his counsel was present, in this *civil*-forfeiture proceeding, where he admitted to multiple trips to Richmond in the Land Rover to acquire heroin and transport it back to Marion. Because corpus delicti is no obstacle to the use of Timbs's testimony, the court's findings are supported by the evidence, and the State proved them by the required preponderance of the evidence, I.C. § 34-24-1-4(a). These findings establish each of the statutory elements recited above to prove the State's entitlement to forfeit the Land Rover – namely, that Timbs used the vehicle to transport and possess heroin, a schedule I controlled substance, *id.* § 35-48-2-4(c) (Supp. 2013), and a narcotic drug, *id.* §§ 35-48-2-4(c), 35-48-1-20(1) (2008 Repl.), for the purpose of engaging in illegal drug trafficking.

Conclusion

For these reasons, we reverse the trial court's judgment for Timbs and remand with instructions to enter judgment for the State on its forfeiture complaint.

Rush, C.J., and David, Massa, and Goff, JJ., concur.

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IN THE
COURT OF APPEALS OF INDIANA

State of Indiana, *Appellant-Plaintiff*, v. Tyson Timbs and a 2012 Land Rover LR2, *Appellees-Defendants.*	October 20, 2016 Corrected Court of Appeals Case No. 27A04-1511-MI-1976 Appeal from the Grant Superior Court 1 The Honorable Jeffrey D. Todd, Judge Trial Court Cause No. 27D01-1308-MI-92

Mathias, Judge.

[1] The State of Indiana filed a complaint for forfeiture in Grant Superior Court seeking to obtain a 2012 Land Rover LR2 owned by Tyson Timbs ("Timbs"). The trial court ruled in favor of Timbs, and the State appeals, presenting one issue, which we restate as whether the trial court erred in concluding

that forfeiture of Timbs's vehicle would constitute a constitutionally excessive fine.

[2] We affirm.

Facts and Procedural History

[3] In January 2013, Timbs purchased a Land Rover LR2 ("Land Rover") for the sum of $42,058.30 from a dealer in Indianapolis. Timbs paid for the Land Rover with life insurance policy proceeds that he received following the death of his father. Thereafter, Timbs began to use this vehicle to drive from Marion, Indiana to Richmond, Indiana for the purposes of purchasing heroin. Timbs also used the Land Rover to transport the heroin back to Richmond.

[4] In May 2013, a confidential informant ("CI") told a member of the Joint Effort Against Narcotics ("JEAN") team[1] that he could purchase heroin from Timbs. The police then set up a controlled buy, and on May 6, 2013, an undercover detective and the CI met Timbs at an apartment.[2] The detective gave the CI the purchase money, and the CI went inside the apartment with Timbs and returned with two grams of heroin that he had purchased for the previously agreed-to price of $275.

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[1] The JEAN team is composed of members from the Grant County Sheriff's Department, the Grant County Prosecutor's Office, and the Marion Police Department.

[2] This apartment was apparently not Timbs's residence. *See* Tr. pp. 27-28.

[5] The police set up another controlled buy on May 22, 2013, to take place at a local gas station. This time, the undercover detective purchased two grams of heroin from Timbs for a price of $260. After this transaction, the detective spoke with Timbs about arranging yet another purchase of heroin. However, on the day this controlled buy was set to take place, the police instead apprehended Timbs during a traffic stop.

[6] On June 5, 2013, the State charged Timbs with two counts of Class B felony dealing in a controlled substance and one count of Class D felony conspiracy to commit theft. On August 5, 2013, the State filed a complaint for forfeiture, seeking to obtain Timbs's Land Rover.

[7] On April 12, 2015, Timbs entered into a plea agreement with the State whereby he agreed to plead guilty to one count of Class B felony dealing in a controlled substance and Class D felony theft in exchange for the State dismissing the remaining charges. The following day, the trial court accepted the plea and sentenced Timbs pursuant to the agreement to six years, with one year executed in community corrections and five years suspended to probation. Pursuant to the plea agreement, Timbs also agreed to reimburse the JEAN team $385 for the cost of the investigation and pay a drug abuse, prosecution, and interdiction fee of $200; court costs of $168; a bond fee of $50; and a $400 certified court program fee after undergoing a drug and alcohol assessment with the probation department. The complaint for forfeiture remained pending.

[8] On July 15, 2015, the trial court held a hearing on the forfeiture complaint. At the hearing, Timbs argued that forfeiture of his Land Rover, which he claimed was worth over $40,000, constituted an excessive fine, given that he had only dealt drugs twice, that he was only convicted for one count of dealing, and that the maximum statutory fine for his crime was $10,000. The trial court took the matter under advisement and, on August 28, 2015, entered an order in favor of Timbs, which provided in relevant part:

> 7. The State now seeks a judgment against the Defendant for forfeiture of the Land Rover; a vehicle that just five (5) months before it was seized had a fair market value of almost four (4) times the maximum monetary fine of $10,000.
>
> 8. The Court finds that the judgment of forfeiture sought by the State violates the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. The amount of the forfeiture sought is excessive and is grossly disproportional to the gravity of the Defendant's offense.
>
> 9. While the negative impact on our society of trafficking in illegal drugs is substantial, a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to the Defendant's illegal conduct.
>
> Judgment is entered in favor of the Defendant and against the State. The Land Rover LR2, at issue, is ordered released to the Defendant immediately.

Appellant's App. pp. 15-16. The State filed a motion to correct error on September 14, 2015, claiming for the first time that the trial court should have ordered a sale of the Land Rover from which a non-excessive fine could be deducted.[3] The trial court held a hearing on the State's motion to correct error on October 14, 2015, and entered an order denying the State's motion on October 21, 2015. The State now appeals.

Standard of Review

[9] At trial, the State bore the burden of establishing the requirements of forfeiture. *See* Ind. Code § 34-24-1-4(a). Thus, the State is appealing from a negative judgment. *See Merrillville 2548, Inc. v. BMO Harris Bank N.A.*, 39 N.E.3d 382, 390-91 (Ind. Ct. App. 2015), *reh'g denied*, *trans. denied*. On appeal, we will not reverse a negative judgment unless it is contrary to law. *Id.* Here, the State argues that the trial court erred in determining that the forfeiture of the Land Rover constituted an excessive fine. This court has held that forfeitures are subject to the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. *$100 and a Black Cadillac v. State*, 822 N.E.2d 1001, 1011 (Ind. Ct. App. 2005), *trans. denied* (citing *Austin v. United States*, 509 U.S. 602, 609-10 (1993)).[4]

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[3] The State does not reiterate this claim on appeal, and even if it did, it is well settled that an issue may not be presented for the first time in a motion to correct error. *Van Winkle v. Nash*, 761 N.E.2d 856, 859 (Ind. Ct. App. 2002).

[4] The State claims that there is a question as to whether the Excessive Fines Clause of the Eighth Amendment is applicable to

We review the trial court's conclusion regarding the excessiveness of a fine *de novo*. *United States v. Bajakajian*, 524 U.S. 321, 336 (1998).

Discussion and Decision

> In rem forfeiture is an ancient concept under which courts obtained jurisdiction over property when it was virtually impossible to seek justice against property owners guilty of violating maritime law because they were overseas. Civil forfeiture traces to ancient Roman and medieval English law; both made objects used to violate the law subject to forfeiture to the sovereign. Civil forfeiture is no longer tethered to difficulties in obtaining personal jurisdiction over an individual. It now serves as one of the most potent weapons in the judicial armamentarium[.] Civil forfeiture is a leading method for imposing economic sanctions against narcotics traffickers.

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the states via the Fourteenth Amendment. The United States Supreme Court has yet to hold that the Excessive Fines Clause is applicable to the States. *See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) ("We shall not decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment."). But this court held in *$100 and a Black Cadillac* that the Excessive Fines Clause did apply to Indiana's forfeiture statutes. 822 N.E.2d at 1011. We see no reason to disagree with our prior opinion. We also note that the Indiana Constitution contains its own provision against excessive fines. *See* Ind. Const. art. 1, sec. 16 ("Excessive fines shall not be imposed). Because neither side addresses the Indiana Constitution, we base our opinion on the federal Excessive Fines Clause.

> Today, all states have statutory provisions for some form of asset forfeiture, and there are more than four hundred federal forfeiture statutes relating to various federal crimes. An important feature of many of these statutes is characterization of the process as civil forfeiture under which (by contrast to criminal forfeiture) a property owner need not be found guilty of a crime – or even charged – to lose permanently their cash, car, home or other property. The relative ease of effecting such forfeiture and the disposition of the assets have become a matter of public note.

Serrano v. State, 946 N.E.2d 1139, 1141 (Ind. 2011) (citations omitted).

[10] The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. At the time the Constitution was adopted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." ***$100 and a Black Cadillac***, 822 N.E.2d at 1011 (quoting *Bajakajian*, 524 U.S. at 327). Accordingly, the Excessive Fines clause of the Eighth Amendment "limits the government's power to extract payments, *whether in cash or in kind*, as punishment for some offense." *Id.* (quoting *Bajakajian*, 524 U.S. at 328) (emphasis added) (internal quotation marks omitted). As noted above, this court has already held that forfeitures in Indiana are subject to the Excessive Fines Clause. *Id.* (citing *Austin*, 509 U.S. at 622).

[11] To determine whether a fine or forfeiture is "excessive," for purposes of the Excessive Fines Clause, we consider whether the amount of the forfeiture bears "some relationship to the gravity of the offense that it is designed to punish." *Id.* (quoting *Bajakajian*, 524 U.S. at 334). A punitive forfeiture violates the Excessive Fines Clause "if it is grossly disproportional to the gravity of a defendant's offense." *Id.* (quoting *Bajakajian*, 524 U.S. at 334).[5]

[12] Here, there is no question that the nature of Timbs's offense was serious. He committed a Class B felony. However, our General Assembly has determined that a Class B felony should be punishable by a maximum fine of $10,000. Here, the evidence before the trial court was that Timbs's vehicle was worth approximately *four times* the amount of the maximum fine. Although we do not suggest that forfeiture of any asset valued over the maximum fine is automatically a violation of the Excessive Fines Clause, it is instructive to our analysis that the value of the asset sought by the State is well in excess of the maximum fine. Moreover, it is undisputed that the Land Rover was not purchased with the proceeds of any criminal behavior; it was purchased with life insurance proceeds.

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[5] The State claims that the Supreme Court in *Bajakajian* "allow[ed] a forfeiture three times the applicable fine" of $5,000. This is incorrect. The Supreme Court was abundantly clear that the only question before it was whether forfeiture of the *entire* amount of cash at issue, $357,144, was proper. *See Bajakajian*, 524 U.S. at 339 n.11.

[13] The State notes that an asset may be forfeited even if the State does not convict the owner of the criminal charge. *See Katner v. State*, 655 N.E.2d 345, 348 (Ind. 1995) (noting that a conviction on the underlying criminal activity is not a prerequisite for forfeiture). Thus, the State argues, it could have sought forfeiture of the Land Rover even if Timbs had not been convicted. However, this does not negate the fact that our General Assembly has set the maximum fine for the crime for which Timbs was convicted at $10,000, whereas the value of the Land Rover was upwards of $40,000.

[14] We also note that financial burdens had already been imposed on Timbs when he pleaded guilty. Pursuant to his plea agreement, Timbs agreed to reimburse the JEAN team $385 for the cost of the investigation and pay a drug abuse, prosecution, and interdiction fee of $200; court costs of $168; a bond fee of $50; and a $400 certified court program fee. Notably, the trial court imposing the sentence found no need to impose *any* fine, much less the maximum fine of $10,000.

[15] The State also argues that the evidence before the trial court was that Timbs committed criminal acts other than the one for which he was convicted. This may be true. However, the complaint for forfeiture referred only to May 31, 2013.[6] If the State wished to

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[6] The complaint set forth in relevant part:

1. On or about May 31, 2013, officers of the Plaintiff, J.E.A.N. Team Drug Task Force, seized from the Defendant, TYSON TIMBS, One (1) 2012 Land Rover LR2 . . . in Grant County, Indiana.

seek forfeiture of the Land Rover based on Timbs's other criminal acts, it should have done so more clearly in its forfeiture complaint. Moreover, even considering these other acts, we note that the only evidence before the trial court was that Timbs sold heroin twice, both times as a result of controlled buys. The remaining times he transported heroin, it was apparently for his own use. The trial court was free to consider these circumstances in making its determination.

[16] We also find the State's citation to *United States v. Aleff*, 772 F.3d 508 (8th Cir. 2014), to be unpersuasive. In *Aleff*, the defendants were convicted of conspiracy to defraud the federal government and ordered to pay almost $304,000 in restitution. Thereafter, the federal government brought suit against the defendants under the False Claims Act, and the District Court

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> 2. On said date and at said place, the Defendant, TYSON TIMBS, had in his possession, the above described vehicle, said vehicle had been furnished or intended to be furnished by Defendant, TYSON TIMBS, in exchange for an act that is in violation of a criminal statute, or used to facilitate any violation of a criminal statute or is traceable as proceeds of the violation of a criminal statute under Indiana Law, as provided in I.C. 34-24-1-1.
>
> 3. The Defendant, TYSON TIMBS, is the owner of the vehicle.
>
> WHEREFORE, the Plaintiffs demand judgment against the Defendant for forfeiture of vehicle, for the delivery of said vehicle upon forfeiture as provided for in I.C. 34-24-1-1, for reimbursement of law enforcement costs as provided by statute, and for all other relief just and proper in the premises.

Appellant's App. p. 14.

awarded the government treble damages and statutory penalties of over $1,300,000. On appeal, the Eighth Circuit Court of Appeals held that this was not grossly disproportionate under the Excessive Fines Clause. *Aleff*, 772 F.3d at 512-13. In so holding, the court noted that the defendants' scheme to defraud the government was extensive and took more than six years. *Id.* at 513. The defendants "received $303,890 from the public fisc to which they were not entitled," and the government "suffered damage to the integrity of one of its programs." *Id.* More importantly, the damages recovered by the government were within the limits of damages allowed by the False Claims Act. *Id.*

[17] The present case is readily distinguishable from *Aleff*. Timbs did not engage in a years-long scheme to defraud the State, nor did the State here seek to recover treble damages under a false claims statute. It instead sought to forfeit a vehicle that was not purchased with the proceeds of Timbs's crimes. Here, the value of the asset subject to potential forfeiture was well over the statutory maximum fine, whereas in *Aleff*, the damages were more than the actual damages but still within the statutory maximum allowed under the False Claims Act.[7]

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[7] The same holds true for the State's citation to *United States v. Mackby*, 339 F.3d 1013 (9th Cir. 2003), which was also brought under the False Claims Act. The total damages awarded in that case were within the statutory limits and the government was directly defrauded. *Id.* at 1018. Although the amount awarded, $729,455, was much greater than the $58,151 sought by the

Conclusion

[18] Forfeiture of the Land Rover, which was worth approximately four times the maximum permissible statutory fine, was grossly disproportionate to the gravity of Timbs's offense. We therefore affirm the trial court's conclusion that forfeiture of the Land Rover violated the Excessive Fines Clause of the Eighth Amendment.

[19] Affirmed.

Vaidik, C.J., concurs.

Barnes, J., dissents with opinion.

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government, the defendants had filed fraudulent Medicare claims for which they received payment of $331,078. *Id.*

IN THE
COURT OF APPEALS OF INDIANA

State of Indiana, *Appellant-Plaintiff*, v. Tyson Timbs and a 2012 Land Rover LR2, *Appellees-Defendants.*	Court of Appeals Case No. 27A04-1511-MI-1976

Barnes, Judge, dissenting.

[20] I respectfully dissent. I realize that my colleagues point to the allegedly "disproportionate" nature of the forfeiture sought by the State here. I understand their concern. I would simply say as follows:

[21] Forfeitures are constitutional and, although some have been found to be excessive, are a useful law enforcement tool. *See U.S. v. Ursery*, 518 U.S. 267, 290, 116 S. Ct. 2135, 2148 (1996).

[22] We have ruled that, in limited situations, the Excessive Fines Clause of the Eighth Amendment may come into play in a forfeiture case. *See $100 and a Black Cadillac*, 822 N.E.2d at 1011-12.

[23] However, it is clear and without conflict in the evidence that the vehicle here was Timbs's and was used to facilitate crime, i.e., to transport Timbs to the place of an arranged heroin buy. The vehicle did not

have only a tangential relationship to the crime or to the defendant. It should not matter that Timbs committed the crime using an expensive new Land Rover rather than an old, inexpensive "beater."

[24] The majority correctly points out that the record reflects Timbs "only" sold heroin twice. I simply posit that Timbs was arrested before the third buy could take place, and we are left to wonder how much heroin he had access to.

[25] I am keenly aware of the overreach some law enforcement agencies have exercised in some of these cases. Entire family farms are sometimes forfeited based on one family member's conduct, or exorbitant amounts of money are seized. However, it seems to me that one who deals heroin, and there is no doubt from the record we are talking about a dealer, must and should suffer the legal consequences to which he exposes himself.

[26] Timbs dealt heroin and got caught. I vote to reverse the trial court's denial of the State's forfeiture request.

STATE OF INDIANA
IN THE GRANT SUPERIOR COURT 1
COUNTY OF GRANT, SS:
2015 TERM

CAUSE NO. 27D01-1308-MI-92

STATE OF INDIANA, and the
J.E.A.N. Team Drug Task Force,
Marion Police Department, and
Grant County Sheriff's
Department,

Plaintiffs

vs

TYSON TIMBS,
One (1) 2012 Land Rover LR2
VIN#SALFR2BG7DH322169,

Defendants

FILED
AUG 28 2015
/s/ Carolyn J. Mowery
CLERK GSC 1

JUDGMENT ORDER

The State appears by counsel, Joshua N. Taylor, and the Defendant appears in person and by counsel, Todd Glickfield, for a hearing on the State's Complaint for Forfeiture filed on August 5th, 2013. Evidence and argument are submitted to the Court and concluded. Having taken this matter under advisement the Court now finds and orders as follows:

1. On or about January 30th, 2013, the Defendant purchased a 2013 Land Rover LR2 vehicle from Tom Wood Jaguar-Volvo in Indianapolis for the sum of $42,058.30.

At the time of purchase, the Land Rover odometer read 1,237 miles.

2. The uncontroverted evidence demonstrated that the Defendant paid for the Land Rover, in full, with life Insurance proceeds he received following his father's death.

3. Between the date of purchase, and May 31st, 2013, the Defendant drove the vehicle frequently from Marion to Richmond to purchase heroin. The Land Rover was used by the Defendant to transport the heroin back to Marion. The Defendant both used and sold the heroin. When the Land Rover was seized by the State at the end of May 2013, the odometer reading was between 17,000 and 18,000 miles. The increased mileage primarily resulted from the Defendant traveling between Marion and Richmond to engage in illegal drug trafficking..

4. On June 5th, 2013, the Defendant was charged in Grant Superior Court II under cause number 27D02-1306-FB-46 with two (2) counts of Dealing in a Schedule I Controlled Substance, Class B felonies, and one count of Conspiracy to Commit Theft, a Class D felony. Ultimately, the Defendant plead guilty to one (1) count of Dealing in a Schedule I Controlled Substance, and Theft. On April 13th, 2015, pursuant to a written plea agreement, the Defendant was sentenced to an aggregate

term of six (6) years at the Indiana Department of Corrections with one (1) year executed and five (5) years suspended and served on formal, supervised probation. The executed portion of the Defendants sentence is being served on home detention through the Grant County Community Corrections Home Detention Program.

5. As part of the plea agreement entered into by the Defendant, he is ordered to reimburse the J.E.A.N Team Drug Task Force $385.00 for costs of investigation; pay a drug abuse, prosecution, and interdiction fee of $200.00; pay court costs of $168.00; and pay a bond fee of $50.00. Finally, the Defendant is ordered to undergo a drug and alcohol assessment and follow through with recommended treatment, and pay a $400.00 Certified Court Program fee to the Grant County Probation Department.

6. The maximum fine for a Class B felony was $10,000.00 on the date of the Defendant's arrest in 2013.

7. The state now seeks a judgment against the Defendant for forfeiture of the Land Rover; a vehicle that just five (5) months before it was seized had a fair market value of almost four (4) times the maximum monetary fine of $10,000.00.

8. The Court finds that the judgment of forfeiture sought by the State violates the

Excessive Fines Clause of the Eighth Amendment of the United States Constitution. The amount of the forfeiture sought is excessive, and is grossly disproportional to the gravity of the Defendant's offense.

9. While the negative impact on our society of trafficking in illegal drugs is substantial, a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to the Defendant's illegal conduct.

10. Judgment is entered in favor of the Defendant and against the State. The Land Rover LR2, at issue, is ordered released to the Defendant immediately.

Dated this 28th day of August, 2015.

/s/ Jeffrey D. Todd
Jeffrey D. Todd, Judge
Grant Superior Court No. 1

STATE OF INDIANA
IN THE GRANT SUPERIOR COURT 1
COUNTY OF GRANT, SS:
2015 TERM

CAUSE NO. 27D01-1308-MI-92

STATE OF INDIANA, and the
J.E.A.N. Team Drug Task Force,
Marion Police Department, and
Grant County Sheriff's
Department,

Plaintiffs

vs

TYSON TIMBS,
One (1) 2012 Land Rover LR2
VIN#SALFR2BG7DH322169,

Defendant

FILED

OCT 21 2015

/s/ Carolyn J. Mowery
CLERK GSC 1

ORDER

The parties appear in person and by counsel for a hearing on the Plaintiff's Motion to Correct Error filed on September 14th, 2015. Arguments are submitted to the Court and concluded. Having taken this matter under advisement, the Court now denies the Plaintiff's Motion to Correct Error in all respects.

Dated this 21st day of October, 2015.

/s/ Jeffrey D. Todd
Jeffrey D. Todd, Judge
Grant Superior Court No. 1

STATE OF INDIANA
IN THE GRANT SUPERIOR COURT
COUNTY OF GRANT
2017 TERM

CAUSE NUMBER: 27D01-1308-MI-92

STATE OF INDIANA, and the
J.E.A.N. Team Drug Task Force,
Marion Police Department, and
Grant County Sheriff's Department,

Plaintiffs

vs

TYSON TIMBS, One (1) 2012
Land Rover LR2
VIN#SALFR2BG7DH322169,

Defendant

ORDER OF JUDGMENT

Pursuant to the Indiana Supreme Court's opinion issued on November 2, 2017, judgment is entered in favor of Plaintiffs and against the Defendant for forfeiture of one (1) 2012 Land Rover LR2 VIN#SALFR2BG7DH322169.

SO ORDERED, this 9 day of November, 2017.

/s/ Jeffrey D. Todd
JEFFREY D. TODD, JUDGE
GRANT SUPERIOR COURT 1

STATE OF INDIANA)	IN THE GRANT COUNTY
) ss:	SUPERIOR COURT 1
COUNTY OF GRANT)	CAUSE NO. 27D01-1308-MI-92

STATE OF INDIANA, and the J.E.A.N. Team Drug Task Force, Marion Police Department, and Grant County Sheriff's Department,

Plaintiffs,

vs.

TYSOM TIMBS, and One (1) 2012 Land Rover LR2 VIN#SALFR2BG7DH322169,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO WITHDRAW ORDER OF JUDGMENT AND SUSPEND PROCEEDINGS PENDING APPEAL TO THE UNITED STATES SUPREME COURT

The Court, having considered Defendants' Motion to Withdraw Order of Judgment and Suspend Proceedings Pending Appeal to the United States Supreme Court and all related filings and being duly advised, now GRANTS said motion. Accordingly, the Court WITHDRAWS its prior Order of Judgment dated November 9, 2017. Further proceedings are hereby STAYED pending the resolution of all appeals.

SO ORDERED, this 15 day of November, 2017.

/s/ Jeffrey D. Todd
JEFFREY D. TODD, JUDGE
GRANT SUPERIOR COURT 1

Distribution To:
All Counsel of Record through the Court's ECF system

No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the Indiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause restricts States' use of civil asset forfeitures.

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INTRODUCTION

Tyson Timbs used his 2012 Land Rover LR2 to purchase and sell heroin in Indiana. After Timbs pled guilty to dealing and conspiracy charges, the State sought forfeiture of the Rover. The trial court and the Indiana Court of Appeals refused to allow the forfeiture on the ground that it violated the Excessive Fines Clause of the Eighth Amendment. But the Indiana Supreme Court reversed and—though neither the State nor Timbs addressed the question—held that the Excessive Fines Clause does *not* apply against the States.

Timbs seeks review of that holding, but his Rover provides an unsound vehicle for deciding whether the Excessive Fines Clause restricts States' use of civil asset forfeitures. In sum, the question was not briefed below and is encumbered by the analytically distinct question whether and how the Excessive Fines Clause applies to state civil asset forfeitures specifically. Moreover, because every state constitution already prohibits excessive fines, and because no lower court has engaged in the incorporation analysis for itself, there are good reasons for the Court to avoid rushing to a decision on the question of Excessive Fines Clause incorporation.

STATEMENT OF THE CASE

The investigation into Timbs's heroin trafficking began with a tip from a confidential informant, which led police to arrange for a controlled drug purchase.

Officers met Timbs and the informant at an apartment building in Marion, Indiana and, after receiving assurances from Timbs regarding the purity of the drugs, purchased two grams of heroin. Hrg. Tr. 25:09–27:07 (July 15, 2015). The officers spoke with Timbs about purchasing more heroin from him at a later date and observed Timbs leave in his Rover. Hrg. Tr. 27:10–25. They arranged a second controlled purchase, where they bought two more grams of heroin from Timbs, and then a third a few days after that. Hrg. Tr. 29:01–30:12. Police arrested Timbs—and seized his Rover—while he was en route to the third sale. Hrg. Tr. 13:13–25; 14:06–08.

While he was in custody, and after being advised of his *Miranda* rights, Timbs told officers that he would drive his Rover from Marion to Richmond, Indiana, to pick up heroin several times a week. Hrg. Tr. 14:09–15:18. At the forfeiture hearing, Timbs explained that he made these trips to Richmond "probably a lot" and put "a lot" of miles on the Rover doing so. Hrg. Tr. 36:09–14.

The State charged Timbs with two counts of Class B felony dealing in a controlled substance and one count of Class D felony conspiracy to commit theft. Pet. App. 3. Timbs pled guilty to the conspiracy count and one of the drug dealing counts in exchange for dismissal of the remaining dealing charge. *Id.* He was sentenced to one year of home detention and five years of probation; he also agreed to pay investigation costs of $385, an interdiction fee of $200, court costs of $168, a bond fee of $50, and a court-certified drug-

and-alcohol assessment fee of $400, for a total of $1,203.00 in fees and costs. *Id.*

The law of Indiana, as with most States, permits the State to seize instrumentalities of the drug trade through civil asset forfeiture proceedings. *See United States v. Bajakajian*, 524 U.S. 321, 333 (1998) ("Instrumentalities historically have been treated as a form of 'guilty property' that can be forfeited in civil *in rem* proceedings."); Caleb Nelson, The Constitutionality of Civil Forfeiture, 125 Yale L.J. 2446, 2451 (2016) (observing that most States have broad civil asset forfeiture laws, though eight require predicate criminal convictions and one no longer authorizes it at all). In particular, Indiana Code section 34-24-1-1 authorizes forfeiture of all vehicles used "to transport or in any manner to facilitate the transportation of ... [a] controlled substance for the purpose of ... [d]ealing in ... a narcotic drug ... [d]ealing in a schedule I, II, or III controlled substance ... [p]ossession of ... a narcotic drug."

Accordingly, following Timbs's arrest, private lawyers acting under the authority of an elected prosecuting attorney filed a complaint seeking forfeiture of the Rover as an instrumentality of drug dealing. Compl. For Forfeiture (Aug. 5, 2013). Timbs's answer simply denied the allegations in the forfeiture complaint and did not raise any constitutional objection to the forfeiture. Answer (Aug. 29, 2013).

The trial court found that Timbs had indeed used the Rover to transport heroin that he later sold, but concluded—without hearing any argument from the

parties on the point—that the forfeiture would violate the Eighth Amendment's Excessive Fines Clause because the value of the Rover was about four times the maximum fine applicable to the drug-dealing charge to which Timbs had pled guilty. J. Order ¶¶ 3, 6–9 (Aug. 28, 2015).

The State moved to correct error and argued that forfeiture of the Rover was not grossly disproportionate in light of the gravity of Timbs's offense and the frequency with which he used the vehicle to transport his illicit product to customers. Hrg. Tr. 52:02–55:02. The State did not argue that the Excessive Fines Clause is inapplicable to state civil asset forfeitures.

The trial court denied the motion, and the State appealed, reiterating its argument that the forfeiture was not disproportionate. Appellant Br. 9–19 (Mar. 30, 2016). The State also acknowledged the "difficult," "threshold question of whether the Excessive Fines Clause even applies to the states, as the Bill of Rights originally applied only to the federal government," but argued that the Court need not decide the question "because the penalties imposed were not unconstitutionally excessive." *Id.* 11 n.1.

A divided panel of the Indiana Court of Appeals affirmed, noting the existence of an "excessive fines" provision in the Indiana Constitution and its prior incorporation of the Eighth Amendment's Excessive Fines Clause against forfeitures. It agreed, over a dissent, that forfeiture of the Rover was grossly disproportionate to the gravity of Timbs's offense. Pt. App. 17–24.

The State sought transfer to the Indiana Supreme Court, again arguing that the forfeiture was not grossly disproportionate. That court granted transfer and reversed. Disregarding "the State's choice not to wage the incorporation battle," it held that the Fourteenth Amendment does not incorporate the Eighth Amendment's Excessive Fines Clause against the States. Pet. App. 9–10.

REASONS TO DENY THE PETITION

I. This Case Is a Flawed Vehicle for Determining Whether the Excessive Fines Clause Is Incorporated

Timbs's case is far from an ideal vehicle for resolving the incorporation question. Two flaws in particular suggest waiting for a case that presents the issue more cleanly.

1. First, throughout the proceedings below, neither Timbs nor the State addressed the question Timbs now asks the Court to answer. The closest either party came is the footnote the State included in its opening brief before the Indiana Court of Appeals noting the "difficult question" of incorporation but arguing that the court "need not decide" it. Appellant Br. 11 n.1 (Mar. 30, 2016).

The absence of briefing on the incorporation question below would significantly impede the Court's consideration of the issue, for it would not have the benefit of arguments tested and refined in lower courts.

Cf. United States v. Bestfoods, 524 U.S. 51, 72–73 (1998) (declining to entertain an issue on which the courts below did not focus). Had the issue been raised earlier in these proceedings, the parties would have had an opportunity to develop record evidence bearing on this question—evidence concerning, for example, the historical practice of state civil asset forfeitures. And gathering this evidence in the proceedings below would be far preferable to assembling it in the first instance in briefs before the Court. *See Sykes v. United States*, 564 U.S. 1, 31 (2011) (Scalia, J. dissenting) ("Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally ... leav[e] important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery."), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015). The Court would be better served to wait for a case where the incorporation issue was litigated from the beginning of the proceedings, rather than raised sua sponte by the lower court.

2. Second, if the Court were to grant Timbs's petition it would need to do more than simply decide whether the Fourteenth Amendment incorporates the Excessive Fines Clause against the States as a general matter. Because this case involves a forfeiture and not a fine, the Court would need also to determine whether the Excessive Fines Clause restricts States' use of civil asset forfeitures specifically.

The need to address the application of the Excessive Fines Clause to state civil asset forfeitures would

complicate the Court's work considerably. The "selective incorporation" test the Court uses to determine whether a right enumerated in the Bill of Rights "is incorporated in the concept of Due Process" asks whether the right "is fundamental to *our* scheme of ordered liberty, or ... whether this right is deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 (2010) (citations and internal quotation marks omitted). This inquiry requires a thorough examination of the historical facts. In *McDonald*, for example, the Court marshalled statements declaring the importance of the right to keep and bear arms from the Founding and Fourteenth Amendment ratification periods to demonstrate that "the Framers and ratifiers of the Fourteenth Amendment counted the right ... among those fundamental rights necessary to our system of ordered liberty." *See id.* at 767–778. Similarly, determining whether the Excessive Fines Clause restricts States' use of civil asset forfeitures would require a detailed look through the historical record to assess the prevalence of States' use of civil asset forfeitures and the existence, if any, of claims that individuals had a legal right to be free from "excessive" forfeitures.

Assembling the historical evidence correctly is not only crucial but also labor-intensive and time-consuming—particularly given the lack of briefing below. Both Timbs and the State would essentially be starting from scratch. The Court should wait for a case that cleanly presents the question of incorporation alone and that leaves for a later case whether and how

the Excessive Fines Clause applies to States' use of civil asset forfeitures.

II. The Court Should Wait to Determine Whether the Excessive Fines Clause Is Incorporated

The Court need not settle for a flawed vehicle to address whether the Excessive Fines Clause is incorporated against the States by the Fourteenth Amendment. Indeed, rather than rushing to answer that question, there are two reasons the Court may comfortably wait for a case that more cleanly presents the incorporation question: There are similar prohibitions of excessive fines in state constitutions, and waiting would provide more chances for lower courts to apply the selective incorporation test the Court reiterated in *McDonald*.

1. First, waiting to decide the incorporation question poses little risk of harm because state constitutions already limit the fines States can impose. *Every* State in the Union—including Indiana—has a state constitutional provision prohibiting the imposition of excessive fines. *See* Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 876–77 & n.177 (2013) (explaining that forty-seven States have clauses specifically prohibiting "excessive fines" and that the remaining three States have clauses either requiring proportionality for penalties or prohibiting excessive punishments generally); Ind. Const. art. 1, § 16 ("Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel

and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.").

There is no reason to doubt that these state constitutional provisions are just as protective as their federal analogue. Many of the decisions Timbs cites use the same analysis for claims under both federal and state constitutional "excessive fine" provisions. *See, e.g., Miller v. One 2001 Pontiac Aztek*, 669 N.W.2d 893, 897 (Minn. 2003); *Ex parte Kelley*, 766 So. 2d 837, 837 (Ala. 1999); *Commonwealth v. Fint*, 940 S.W.2d 896, 897–98 (Ky. 1997); *State v. Hill*, 635 N.E.2d 1248, 1256 (Ohio 1994). The Indiana Supreme Court, for example, has specifically held that Article 1, § 16 of the Indiana Constitution should be interpreted in parallel with the Eighth Amendment, explaining in review of a mandatory life sentence that it could "see no reason for creating a greater or lesser standard under article one, section sixteen [of Indiana's Constitution] when its language is so similar to the relevant Eighth Amendment standard." *Norris v. State*, 394 N.E.2d 144, 150 (Ind. 1979).

Such state supreme court decisions show that the Court should wait to see how these courts apply their state constitutions' "excessive fines" provisions to civil asset forfeitures. Indeed, denying Timbs's petition may even encourage individuals seeking to recover forfeited property to raise state constitutional claims in addition to Eighth Amendment claims. More state constitutional claims would afford more chances for state courts to expound the meaning of analogous state constitutional provisions, which would, in turn,

inform the Court's ultimate consideration, sometime in the future, of whether and how to apply the Excessive Fines Clause to state civil asset forfeitures.

2. Second, the Court should wait until it has obtained "the benefit it receives from permitting several courts of appeals to explore a difficult question before [it] grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). Lowers courts' analyses provide invaluable assistance to the Court. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (observing "the wisdom of allowing difficult cases to mature through full consideration by the courts of appeals."). With respect to the incorporation of the Excessive Fines Clause, however, the lower-court record remains incomplete.

Only a handful of the decisions cited in Timbs's petition directly addressed whether the Excessive Fines Clause is incorporated. *See, e.g., Qwest Corp. v. Minnesota Public Utilities Commission*, 427 F.3d 1061, 1069 (8th Cir. 2005); *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 162 n.7 (Pa. 2017); *Pub. Emp. Ret. Admin. Comm'n v. Bettencourt*, 47 N.E.3d 667, 672 n.7 (Mass. 2016); *Vanderbilt Mortg. & Fin. v. Cole*, 740 S.E.2d 562, 570 n.10 (W. Va. 2013); *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420 (Cal. 2005), *as modified* (Jan. 18, 2006); *State v. 2003 Chevrolet Pickup*, 202 P.3d 782, 783 (Mont. 2009); *One (1) Charter Arms, Bulldog 44 Special v. State ex rel. Moore*, 721 So.2d 620, 623 (Miss.1998).

Meanwhile, a few more decisions noted but did not answer the incorporation question. *See, e.g., Simic v.*

City of Chicago, 851 F.3d 734, 739 (7th Cir. 2017); *Cripps v. La. Dep't of Agric. & Forestry*, 819 F.3d 221, 234 (5th Cir. 2016); *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 1005 n.21 (9th Cir. 2007).

Most, however, simply held that the Clause applies to state *forfeitures* without addressing whether it applies to States at all. *See, e.g., One 2001 Pontiac Aztek*, 669 N.W.2d at 895; *State v. Real Property at 633 East 640*, 994 P.2d 1254, 1256 (Utah 2000); *Ex parte Kelley*, 766 So. 2d at 840; *Fint*, 940 S.W.2d at 897–98; *Levingston v. Washoe Cty.*, 916 P.2d 163, 169 (Nev. 1996); *In re 1982 Honda*, 681 A.2d 1035, 1039 (Del. 1996); *Hill*, 635 N.E.2d at 1254; *People ex rel. Waller v. 1989 Ford F350 Truck*, 642 N.E.2d 460, 464–65 (Ill. 1994); *Thorp v. State*, 450 S.E.2d 416, 417 (Ga. 1994), *abrogated on other grounds by Howell v. State*, 656 S.E.2d 511 (Ga. 2008); *Idaho Dept. of Law Enforcement By and Through Cade v. Free*, 885 P.2d 381, 383 (Idaho 1994).

It bears observing that *none* of these decisions addressed the question Timbs has presented here: whether the Court's "selective incorporation" framework requires interpreting the Fourteenth Amendment to incorporate the Excessive Fines Clause against the States. *See, e.g., McDonald*, 561 U.S. at 763–64. Instead, to the degree these decisions addressed incorporation at all, they relied entirely on stray dicta. *See, e.g., Qwest Corp*, 427 F.3d at 1069 (citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* 532 U.S. 424, 433–34 (2001)); *1997 Chevrolet*, 160 A.3d at 162 n.7 (same); *Bettencourt*, 47

N.E.3d at 672 n.7 (same); *Cole*, 740 S.E.2d 562, 570 n.10 (same).

Delaying consideration of the incorporation question would give the lower courts an opportunity to engage in the substantive "selective incorporation" analysis required by the Court's precedents. Indeed, denying Timbs's petition would implicitly reiterate the obligation of lower courts to apply the appropriate test rather than await an answer from the Court.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Dated: May 4, 2018

No. 17-1091

In The
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Indiana Supreme Court

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In 1989, this Court remarked that it had yet to "decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment." *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989). In the intervening 29 years, courts have split on whether the Excessive Fines Clause is incorporated. Still, the State of Indiana asks this Court to "avoid rushing" to decide the issue. Br. in Opp. 1.

The State's Brief in Opposition, however, confirms that this is a perfect case in which to resolve the issue. The State agrees there is an entrenched split of authority (although it views the divide as "[o]nly" a 5-4 split, *see id.* 10, rather than the 16-4 split detailed in the Petition, *see* Pet. 13-21). The State does not dispute that the Indiana Supreme Court's decision conflicts with this Court's precedent. And the State does not deny that the question presented is a nationally important one that only this Court can resolve.

The State nonetheless contends that this case is a "flawed vehicle." Br. in Opp. 8. It is not, and the State's arguments to the contrary lack merit. First, the State asserts that answering the question presented—whether the Excessive Fines Clause applies to the States—would require the Court to also answer "whether and how the Excessive Fines Clause applies to state civil asset forfeitures specifically." *Id.* 1. But the Court has already held that the Clause "protects against excessive civil fines, including forfeitures." *Hudson* v. *United States*, 522 U.S. 93, 103 (1997) (citing *Austin* v. *United States*, 509 U.S. 602 (1993)). That

same standard will apply to state civil forfeitures if this Court holds (as it should) that the Excessive Fines Clause applies to the States.

Second, the State suggests that the Indiana Supreme Court's decision might have been more "refined" had the parties made better arguments. Br. in Opp. 5. But the court's opinion represents the most in-depth discussion from any court on whether the Excessive Fines Clause applies to the States. Although the court reached the wrong conclusion, it could not have been clearer about its rationale: It "decline[d] to find or assume incorporation until the Supreme Court decides the issue authoritatively." Pet. App. 8. This Court should grant the Petition and decide the issue authoritatively.

REASONS FOR GRANTING THE PETITION

I. The State does not dispute that there is a split of authority on the question presented.

The Indiana Supreme Court's decision deepens a split with 14 other state high courts and two federal courts of appeals, all of which have applied the Excessive Fines Clause to the States. *See* Pet. 13-18. Indiana now joins the supreme courts of Montana and Mississippi, and Michigan's court of appeals, in holding that the Clause is not incorporated. *See id.* 19-21.

The State does not dispute that the split of authority is substantial. In favor of incorporation, the State

counts four state supreme courts and a federal court of appeals. Br. in Opp. 10 (listing Eighth Circuit, California, Massachusetts, Pennsylvania, and West Virginia). Against incorporation, the State counts three supreme courts, *id.* 1, 10 (listing Indiana, Montana, and Mississippi), and it does not dispute that Michigan's intermediate court has also held, several times, that the Clause is not incorporated, *see* Pet. 20-21.

This Court's intervention would be warranted even if the split were as the State describes it. But of course, the split is far deeper. The Petition details 10 additional state high courts (along with the Ninth Circuit) that have also applied the Excessive Fines Clause to the States. *See id.* 13-18. The State attempts to dismiss these decisions by asserting they "held that the Clause applies to state *forfeitures* without addressing whether it applies to States at all." Br. in Opp. 11 (emphasis in original). But a court applying the Excessive Fines Clause to "state forfeitures" has necessarily applied the Clause "to States." The Delaware Supreme Court, for example, holds that "it is clear that civil forfeitures imposed pursuant to Delaware law are subject to the constraints of the Excessive Fines Clause of the Eighth Amendment." *In re 1982 Honda*, 681 A.2d 1035, 1039 (Del. 1996). Even without using the word "incorporation," that holding leaves no room for doubt: Punitive economic sanctions in Delaware "are subject to the constraints of the Excessive Fines Clause of the Eighth Amendment." *Id.* The other jurisdictions that the State would exclude from the split are equally clear that the Clause applies within their

borders. *See* Pet. 13-18; *see also id.* 18 n.5 (listing intermediate courts in nine additional states that have applied the Clause).

In sum, both the Petition and the State's Brief in Opposition demonstrate a substantial split of authority on the question presented.

II. The State does not dispute that the Indiana Supreme Court's decision conflicts with this Court's precedent.

Certiorari is also warranted because the Indiana Supreme Court's decision conflicts with this Court's precedent. The court overlooked a half-dozen instances where this Court has said that the Excessive Fines Clause is incorporated. *See* Pet. 10. And finding no sufficiently "definitive" decision from this Court, Pet. App. 9, the Indiana Supreme Court declined to perform the incorporation analysis on its own. The result is a holding that departs from this Court's precedent, breaks with "well established" incorporation principles, *McDonald* v. *City of Chicago*, 561 U.S. 742, 750 (2010), and strips the residents of Indiana of a federally protected right. *See* Pet. 21-27.

Again, the State does not disagree; it offers no defense of the Indiana Supreme Court's decision to "opt not" to give effect to the Excessive Fines Clause. Pet. App. 4. Instead, the State asserts that the best way to address this error is to overlook it. That is because, in the State's view, denying the Petition might "implicitly reiterate the obligation of lower courts to apply the

appropriate test rather than await an answer from th[is] Court." Br. in Opp. 12. But "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *North Carolina* v. *N.C. State Conference of NAACP*, 137 S. Ct. 1399, 1400 (2017) (statement of Roberts, C.J., respecting denial of certiorari) (quoting *United States* v. *Carver*, 260 U.S. 482, 490 (1923)). If—as the parties seemingly agree—state courts must enforce federally protected rights, the way to reiterate that obligation is to grant the Petition and reverse the judgment of the Indiana Supreme Court.

III. The question presented is important and should be resolved in this case.

As discussed in the Petition and supporting *amicus* briefs, the Excessive Fines Clause is a key check on disproportionate economic sanctions. Given the recent explosion in fines and forfeitures at the state and local levels, the Clause is as essential now as ever. Whether the Clause applies to the States is thus a question of pressing national importance. *See* Pet. 27-36.

The State does not dispute the importance of the question presented. It contends instead that this case is a "flawed vehicle," Br. in Opp. 8, but each of the State's vehicle arguments lacks merit.

First, the State asserts that the incorporation issue was "not briefed below." *Id.* 1. That is incorrect; the State's court-of-appeals brief devoted over 10 percent of its argument section to the "threshold question" of incorporation. Appellant's Br., *State* v. *Timbs*, No.

27A04-1511-MI-1976, 2016 WL 11200867, at *11 n.1 (Ind. Ct. App. Mar. 30, 2016); *see also* Br. in Opp. 5 (acknowledging that the State raised this issue). Having argued incorporation—and won—the State cannot credibly claim that the issue was never raised.*

The State also considers the Indiana Supreme Court's opinion insufficiently "refined" for review. *See* Br. in Opp. 5. But this Court "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). And regardless, the Indiana Supreme Court absolutely "focus[ed]" (Br. in Opp. 6) on whether the Excessive Fines Clause applies to the States. Despite reaching the wrong conclusion, the court's opinion is the most comprehensive of any decision—state or federal—to have considered the issue. And the State offers no reason to think that future courts will shed further light on the issue by "engag[ing] in the substantive 'selective incorporation' analysis" the State envisions. *Id.* 12. If the past three decades are any guide, no court is likely to do so anytime soon. *Cf. id.* 10-12 (faulting the depth of analysis

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* The State also notes that Petitioners did not invoke the Eighth Amendment in their answer. Br. in Opp. 3. That is irrelevant, and the State does not argue otherwise. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 197 (10th ed. 2013) ("Once it is clear that the highest state court has actually passed on the federal question, any inquiry into how or when the question was raised in the state courts is considered irrelevant to the exercise of the Court's jurisdiction. An irrebuttable presumption is created that the federal question was timely and properly raised."); *see also Burch* v. *Louisiana*, 441 U.S. 130, 133 n.5 (1979).

of other courts that have confronted the Clause's incorporation).

Second, the State contends that apart from whether the Excessive Fines Clause is incorporated, this case presents a "complicate[d]" secondary question about whether the Clause applies to "state civil asset forfeitures specifically." *Id.* 1, 7. It is hard to see why. The Indiana Supreme Court's decision did not turn on any special feature of Indiana's civil-forfeiture regime. Instead—as the State acknowledges (*id.* 1, 5)—the court rejected federal excessive-fines protections in all circumstances. In Indiana, the Clause does not apply to any form of punitive economic sanction—forfeiture or otherwise—imposed by state and local officials. Contrary to the State's view, the decision "cleanly presents the question of incorporation alone." *See id.* 7.

The State also misconstrues the incorporation analysis at a more basic level. The question presented—whether the Excessive Fines Clause applies to the States—does not require this Court to answer "whether and how the Excessive Fines Clause applies to state civil asset forfeitures specifically." *Id.* 1, 6-8. If the Clause applies, then it will apply to state civil-forfeiture laws in the same way it applies to federal civil-forfeiture laws. *See McDonald*, 561 U.S. at 765 ("[I]ncorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'") (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 10 (1964)). And this Court has already held that

forfeiture "constitutes 'payment to a sovereign as punishment for some offense,' and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Austin*, 509 U.S. at 622 (citation omitted). Indeed, state courts—including the Indiana Court of Appeals—have long applied *Austin* to civil forfeiture. *$100* v. *State*, 822 N.E.2d 1001, 1010-11 (Ind. Ct. App. 2005); *see also, e.g.*, *Dean* v. *State*, 736 S.E.2d 40, 47-48 (W. Va. 2012); *Ex parte Kelley*, 766 So. 2d 837, 839-40 (Ala. 1999); *In re 1982 Honda*, 681 A.2d at 1039. As a result, the State is wrong to question whether "individuals ha[ve] a legal right to be free from 'excessive' forfeitures." Br. in Opp. 7. They do. The only question is whether that right is incorporated.

Third, the State stresses the lack of "record evidence" concerning "the historical practice of state civil asset forfeitures." *Id.* 6. But what the State characterizes as "record evidence" is nothing more than the legal research required for any constitutional case before this Court. *See, e.g.*, *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373-78 (2018). The fact that legal research may be "time-consuming" and "labor-intensive" (Br. in Opp. 7) is not a vehicle problem.

The State's understanding of the necessary "historical evidence" (*id.*) also repeats its mistaken view of the question presented. The State foresees a deep dive into "the historical practice of state civil asset forfeitures." *Id.* 6; *see also id.* 7. But as just discussed, this Court has already held that civil-forfeiture laws are subject to the Excessive Fines Clause when they are at

least partly punitive. There is no reason to reopen that issue in resolving the question of incorporation.

Fourth, the State suggests that "waiting" to address the question presented would "pose[] little risk of harm because state constitutions already limit the fines States can impose." Br. in Opp. 8. But the same could have been said of the right incorporated in *McDonald*. Like the Bill of Rights, the Illinois Constitution guarantees the right to keep and bear arms. *See* Ill. Const. art. I, § 22. Even so, the plurality in *McDonald* applied "a single, neutral principle" of incorporation to establish a floor of federal protection nationwide. 561 U.S. at 788. And that makes sense. The federal Constitution's guarantees are "not the less valuable and effective because of the prior and existing inhibition[s] ... in the constitutions of the several states." *O'Neil* v. *Vermont*, 144 U.S. 323, 363 (1892) (Field, J., dissenting).

Nor is it clear how giving state courts more time to "expound" (Br. in Opp. 9) on their own constitutions would affect the question presented. No matter how a State's constitution might be construed, Section 1 of the Fourteenth Amendment establishes "federal enforcement of constitutionally enumerated rights against the States." *McDonald*, 561 U.S. at 840-41 (Thomas, J., concurring in part and concurring in the judgment). That is why the First Amendment has long been incorporated, notwithstanding the prevalence of state protections for expressive and religious rights. The same is true of the Second and Fourth Amendments, and parts of the Fifth, Sixth, and Eighth

Amendments, all of which have state equivalents. If anything, the popularity of state excessive-fines protections suggests that—like other federal rights with state analogues—the Eighth Amendment's Excessive Fines Clause secures a fundamental right and merits incorporation under Section 1 of the Fourteenth Amendment. *See* Pet. 25.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing amicus briefs in cases involving issues of national concern to American business.

The Chamber and its members have a strong interest in ensuring a fair and predictable legal environment across the United States. Unfortunately, and with increasing frequency, state and local legislatures are authorizing – and executive officials are seeking – excessive fines and forfeitures[2] for relatively modest violations of the law by businesses and individuals. While the Eighth Amendment's Excessive Fines Clause restricts

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than amicus curiae, its members, or its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief. All parties have received timely notice of amicus curiae's intent to file and consented to the filing of this brief.

[2] Under this Court's Excessive Fines Clause jurisprudence, "[f]orfeitures—payments in kind—are . . . 'fines' if they constitute punishment for an offense." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998).

excessive fines arising under federal law, the lack of a uniform, similar constraint on the governments in the 50 states is needlessly driving up costs for businesses, increasing prices for consumer goods and services, and undermining economic growth.

Petitioner here asks this Court to consider only whether the protection of the federal Excessive Fines Clause of the Eighth Amendment is applicable to the States under the Fourteenth Amendment. State courts, absent clear guidance from this Court, have offered inconsistent answers to this question. The Chamber believes this case presents an ideal vehicle to conclusively resolve the constitutional issue of incorporation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Succinctly stated, the Eighth Amendment prohibits "excessive sanctions." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (internal quotation marks omitted). In a series of twentieth-century opinions, the Supreme Court held much of the Bill of Rights applicable to the States, including two-thirds of the Eighth Amendment's guarantees against excessiveness. *See Robinson v. California*, 370 U.S. 660, 675 (1962) (prohibiting cruel and unusual punishments); *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (prohibiting excessive bail). As to the Eighth Amendment's Excessive Fines Clause, however, this Court's jurisprudence has been unclear. *Compare Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433–34 (2001) (the "Due Process Clause . . . makes the Eighth Amendment's prohibition against

excessive fines . . . applicable to the States"), *with McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 765 n.13 (2010) ("We never have decided whether the . . . the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause"). This case presents an opportunity to remove this important constitutional uncertainty.

The petition here presents a compelling fact pattern that underscores the need for a definitive ruling by this Court. The maximum statutory fine for Petitioner's offense was $10,000, but prosecutors ultimately reached an agreement to resolve the monetary aspects of the case for $1,203 in costs and fees. Pet. at 6-8. Several months later, however, a private law firm moved on behalf of the State for forfeiture of the vehicle used in the commission of the crime: a vehicle worth more than 33 times the fine imposed in the case and 4 times the maximum fine allowed under Indiana law. *Id.* at 7. Although Petitioner's counsel raised an Eighth Amendment defense, the Indiana Supreme Court declined to even review the forfeiture under the federal Excessive Fines Clause "[a]bsent a definitive holding from the Supreme Court" that such a review was required. *Id.* at 9-10.

The disproportionality in this case is not unique. Across the country, state and local prosecutors are targeting large and small businesses for similar treatment. Newspapers and legal literature from the 1980s forward are replete with examples of large fines being handed out for even the smallest of violations – at great cost to businesses and their customers – all because decision-makers have

been persuaded to invoke the "deep-pockets" theory of corporate exposure.

The Petitioner's case – alongside the business-focused examples described in this submission – should be cause for this Court's concern. This Court has long extolled the Framers' motivations in adopting the Eighth Amendment. But in recent decades, many of the same excesses that originally led to the federal constitutional prohibition now present themselves forcefully in states that have not recognized the Clause's incorporation. And often, state and local prosecutors have pursued excessive sanctions for the government's financial benefit, rather than to mete out justice fairly and proportionately to the underlying offense.

The solution to this problem is straightforward. The Founders recognized the judiciary as the last line of defense against overzealous prosecution. This Court should embrace the judicial branch's role in reviewing fines and other monetary sanctions for excessiveness. The Eighth Amendment's Excessive Fines Clause should be held applicable to the States.

ARGUMENT

I. THE UNCHECKED PROLIFERATION OF DISPROPORTIONATE FORFEITURES AND REVENUE-SEEKING FINES UNDERMINES ECONOMIC GROWTH.

A. Mandatory Forfeitures Are Increasingly Common and Problematic.

Penalty statutes – and in particular here, statutes imposing fines and forfeitures – are often drafted with the worst prospective offender in mind. As commentators have noted, penalty amounts have "tended to be quite high because legislatures have used a 'worst case' mentality in setting them." Robert O. Dawson, *Sentencing Reform: The Current Round Toward a Just and Effective Sentencing System: Agenda for Legislative Reform. by Pierce O'Donnell, Michael J. Churgin & Dennis E. Curtis.* New York: Praeger Publishers, 88 Yale L.J. 440, 442 (1978) ("*Sentencing Reform*"). For example, in the early 1970s, Congress passed legislation, including the Racketeer Influenced and Corrupt Organizations Act, which authorized forfeiture of property connected to the criminal enterprise. These laws – and other statutes like them in the years since – were an "'extraordinary' weapon" against those who had significant involvement in organized crime, but they did not take into account the unfairness that such "drastic" measures would have against others with less culpability. *Russello v. United States*, 464 U.S. 16, 27 (1983)).

The responsibility for reviewing fines to ensure that they are not grossly disproportionate to the alleged wrongdoing lies principally with the judiciary. In fact, legislatures rely upon trial judges "to mitigate the severity of punishment in the great majority of cases." Robert O. Dawson, *Sentencing Reform*, 88 Yale L.J. at 442. And a key part of that analysis in many jurisdictions is the Excessive Fines Clause.

Incorporation of this provision would impose a duty on state courts to go beyond whether a fine is authorized under state law and ask whether it is appropriate in the actual circumstances before the court. Without this additional check, the resultant financial penalties can offend basic notions of fairness and add little to deter the ills the legislature was attempting to prevent in the first place.

B. Governments Are Increasingly Misusing Mandatory Forfeitures and Fines as Revenue Streams Rather Than as a Proportionate Punishment for a Particular Offense.

Fines and related forfeitures are on the rise in America, as are state and local government's reliance on – and abuse of – such enforcement mechanisms. *See, e.g.*, David J. Stone, *The Opportunity of Austin v. United States: Toward A Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. Rev. 427, 429-30 (1993). In 1991, a Justice Department memorandum observed that "state and local law enforcement agencies were becoming increasingly dependent upon equitable sharing of forfeiture

proceeds," with nearly $1.4 billion in assets transferred to the agencies as of 1994. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 64 (1998). By 2017, "[f]orfeitures, particularly civil forfeitures, have become a powerful tool for the Department of Justice, as well as for local law enforcement agencies," with dollar amounts far exceeding total from the 1990s. David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as A Check on Government Seizures* ("*Forfeitures*"), 11 Harv. L. & Pol'y Rev. 541, 541–42 (2017).

For their part, local officials now openly boast about their profit-making enterprises and engage contingent fee private attorneys to pursue them. In fact, a "national study found 60 percent of the 1,400 municipal and county agencies surveyed across the country relied on forfeiture profits as a 'necessary' part of their budget." Barnini Chakraborty, *Despite Promises to Cut Back, Fed and State Governments Press Asset Forfeitures*, Fox News (Jan. 30, 2018).[3] Indeed, the Las Cruces, New Mexico city attorney bragged that, through civil forfeitures:

> "We could be czars. We could own the city. We could be in the real estate business." He detailed how police targeted nice vehicles and other

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[3] http://www.foxnews.com/politics/2018/01/30/despite-promises-to-cut-back-fed-and-state-governments-press-asset-forfeitures.html.

> desirable assets, but that they should pursue bigger fish: "This is a gold mine! A gold mine! You can seize a house, not a vehicle!"

David Pimentel, *Forfeitures*, 11 Harv. L. & Pol'y Rev. at 550.

Not only are the fines and forfeitures sought by state and federal governments massive in the aggregate, but the fines on a case-by-case are equally as staggering, sometimes reaching "into the billions of dollars against a single entity." U.S. Chamber Institute for Legal Reform, *Constitutional Constraints: Provisions Limiting Excessive Government Fines* at 1 (Oct. 2015).[4] For example, the State of New York and the City of New York recently sought $872 million in penalties – and were awarded $247 million – against UPS because a small number of sellers used UPS's services to ship untaxed cigarettes. Anthony Noto, *UPS Vows to Fight $247M Penalty for Shipping Untaxed Cigarettes*, New York Business Journal (May 26, 2017).[5] At the opposite end of the country, Hunt County, Texas hired private attorneys who sought approximately $2 billion in fines from a landowner for improperly storing a pile of wood

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[4] http://www.instituteforlegalreform.com/uploads/sites/1/ConstitutionalConstraints_web.pdf.

[5] https://www.bizjournals.com/newyork/news/2017/05/26/ups-vows-to-fight-247m-penalty.html.

on his property. *See* U.S. Chamber Litigation Ctr., *Grady v. Hunt Cty., Texas*.[6]

Moreover, entities are frequently subject to multiple fines by different government actors for the same conduct. U.S. Chamber Institute for Legal Reform, *Constitutional Constraints: Provisions Limiting Excessive Government Fines*, at 1. For example, the South Carolina Supreme Court recently upheld a $124 million civil penalty award in a case brought by the South Carolina Attorney General against Johnson & Johnson for the same purported misconduct regarding a drug that was already the subject of the company's $2.2 billion settlement with the federal government. *Id.* at 5. "If the other 49 states followed South Carolina's lead, it would amount to over $6 billion in civil fines on top of the federal government's $2.2 billion settlement." *Id.*

Fines are hurting small businesses, in particular, with the "explosion of civil forfeiture cases [bringing] with it persistent allegations of abuse." Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111, 1120 (2017) ("*Excessive Punishment in Civil Forfeiture*"). For example:

> The CBS television show, 60 Minutes, highlighted the plight of Willie Jones, a

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[6] http://www.chamberlitigation.com/cases/grady-v-hunt-county-texas.

> black landscaper who was stopped at the Nashville airport after being observed paying cash for his airline ticket. Law enforcement authorities detained Mr. Jones and seized $9,000 in cash from his person because, according to police, he matched the profile of a drug courier. In fact, he was traveling to Texas to buy shrubs for his landscaping business and needed cash to do so. Nonetheless, police confiscated his $9,000, and released him without ever charging him with a crime. Mr. Jones sued the government to get his money back and ultimately prevailed, with the presiding judge noting that "the statutory [forfeiture] scheme as well as its administrative implementation provide[d] substantial opportunity for abuse and potentiality for corruption."

Id.

In New York City, small businesses "flooded [then-Public Advocate Bill de Blasio's] office with complaints of being hounded for minor offenses and [being] forced to pay 'excessive' fines." Jessica Dye, *NY Public Advocate Slaps City with Lawsuit over Fines*, Reuters (July 26, 2012). With the City's estimated fine revenue doubling from $400 million to $800 million in a ten-year period, de Blasio sought "answers about what this 'fine first, ask questions later' enforcement is doing to our small businesses and their ability to survive in this economy." *Id.* *See*

also Erin Durkin, ***Newkirk Plaza Merchants Hit with Fines as de Blasio Pushes City to Ease Up on Small Businesses***, N.Y. Daily News, Apr. 25, 2012.[7] These fines had particularly deleterious effects on New York's "[i]mmigrant entrepreneurs," who found themselves faced with a "harsh enforcement of non-critical violations [that] are creating unnecessary obstacles to small business success." Office of Bill de Blasio, ***Report de Blasio: City Budgets Drowning Small Businesses in Frivolous Fines*** (Apr. 25, 2012), available at http://www.maketheroad.org/article.php?ID=2359.

All of these examples reflect the type of injustice the Eighth Amendment should preclude. "There is good reason to be concerned," Justice Scalia wrote, "that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." ***Harmelin v. Michigan***, 501 U.S. 957, 978 n.9 (1991) (Scalia, J.).[8] "Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a

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[7] http://www.nydailynews.com/new-york/brooklyn/newkirk-plaza-merchants-hit-fines-de-blasio-pushes-city-ease-small-businesses-article-1.1067535.

[8] Indeed, even before adoption of the Fourteenth Amendment, officials recognized the particular destructive power of fines on businesses. In an 1864 speech, Pennsylvania Senator Edgar Cowan argued that in order for fine to be constitutional, it must "save[] . . . to the merchant his merchandise [and] to the villein his wainage." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 884 (2013) (citing Cong. Globe, 38th Cong., 1st Sess. 561 (1864) (statement of Sen. Edgar Cowan)).

source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.*

While a remedy for these problems might lie with state legislatures, they are not always careful guardians of constitutional rights and, in times of budgetary crisis, are often looking for new avenues to raise funds. Such bodies are "overstocked with lawyers" who have little interest in limiting potential sources of revenue for themselves or their private sector colleagues (in the form of assistance with forfeiture proceedings, for example). *Less Punitive Damages*, Wash. Post, July 11, 1989.[9] Moreover, legislators are often politically reluctant to discontinue a funding stream that limits the need for tax increases.

Defendants also cannot always take refuge in state constitutional or statutory prohibitions on excessive fines. Not all states prohibit excessive fines. Moreover, trying to track legal developments and adjust one's business affairs based on fifty different rules for excessive fines is a prohibitively cumbersome jigsaw puzzle for many corporations to solve.

Thus, the only way that the longstanding constitutional principles underlying the Excessive Fines Clause will truly be applied fairly and uniformly

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[9] https://www.highbeam.com/doc/1P2-1200624.html.

to all businesses and individuals across this country is through action by this Court.

C. Excessive Fines, and the Legal Uncertainty Surrounding Whether They May Be Imposed, Hinder Economic Growth.

While this case comes to the Court in the context of the State imposing a grossly disproportionate sanction on a single individual, Petitioner is not alone in seeking a fair, uniform standard. The business community and its customers are equally affected.

"Over-punishment can . . . lead to over-deterrence, where businesses become too cautious and refrain from undertaking competitive activity because of fear that the activity may be deemed" a violation of law. John Terzaken & Pieter Huizing, Allen & Overy, *How Much Is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels*, Antitrust, at 6 Spring 2013 ("*How Much Is Too Much*").[10] When corporations face the prospect of excessive financial penalties, products are "withheld from the market by lawsuit-leery companies," L. Stuart Ditzen, *Are Punitive Damage Awards Too Punishing?*, Phila. Inquirer, Oct. 29, 1989, thereby depriving businesses of profitable opportunities and consumers of the products that they might want to purchase. With over 493,000 small businesses and 1,173,626 employees of such businesses in Indiana

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[10] http://awa2014.concurrences.com/IMG/pdf/how_much.pdf.

alone, *see* U.S. Small Business Admin., *Small Business Profile: Indiana*,[11] for example, even modest risk-based adjustments can have a significant impact.

Consumers are affected in other ways. "Excessive fines, designed to punish corporations, will more likely than not hurt consumers by requiring an excessive increase in prices as well as an excessive diversion of resources to prevention activities." Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. Rev. 395, 402 (1991). Moreover, "excessive fines may lead to insolvency . . . , which in certain markets may significantly weaken competition and ultimately hurt consumers in that market." John Terzaken & Pieter Huizing, *How Much Is Too Much* at 6.

The continuing uncertainty in the legal landscape also takes a toll. Among other things, such uncertainty increases transaction costs, hinders entrepreneurial investment, and deters consumer purchases. Indeed, "[b]usinessmen . . . require the decisions of the courts on commercial issues to be predictable so that they know where they stand." L. S. Sealy and R J A Hooley, *Commercial Law: Text, Cases and Materials* at 10 (5th ed. 2003). This is particularly true here, where businesses may have their goods and services crossing between jurisdictions that recognize the binding effect of the Eighth Amendment and those who do not. As the amount of the excessive fines grows, *see supra* at 6-11, businesses may need to avoid transactions in

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[11] https://www.sba.gov/sites/default/files/advocacy/IN_0.pdf.

jurisdictions where businesses are treated unfairly. Such inefficiencies, caused by legal uncertainty and a patchwork of inconsistent legal regimes, do not serve businesses or consumers well.

II. EIGHTH AMENDMENT REVIEW OF STATE FORFEITURES AND FINES IS A CONSTITUTIONALLY NECESSARY CHECK ON ABUSIVE FINES AND SHOULD BE MANDATED BY THIS COURT.

With almost no analysis, the Indiana Supreme Court elected not to apply the federal Excessive Fines Clause here because "the federal government itself has not mandated" this result. *State v. Timbs*, 84 N.E.3d 1179, 1183–84 (Ind. 2017). But the Excessive Fines Clause is precisely the type of constitutional provision that should be incorporated. Allowing Indiana's decision to stand only emboldens other jurisdictions to reject long-established principle and precedent.

A. The Excessive Fines Clause Is Precisely the Type of Constitutional Provision That Should Be Incorporated.

Individual components of the Bill of Rights are incorporated against the States where a provision is "fundamental to *our* scheme of ordered liberty" or where the right is "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767 (citation omitted); *see also Cantwell v. State of*

Connecticut, 310 U.S. 296, 303 (1940). Both are true here.

It is a basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). In fact, this "enduring principle" was long ago embedded into the Magna Carta, Andrew M. Kenefick, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699, 1716 (1987), and reaffirmed by key thought leaders during The Enlightenment. While the "sovereign's right to punish crimes is founded . . . upon the necessity of defending the public liberty," Cesare Bonesana-Beccaria wrote in his quintessential work on crime, the "punishments [must be] just in proportion as the liberty, preserved by the sovereign, is sacred and valuable." Cesare Bonesana-Beccaria, *An Essay on Crimes and Punishments*, at 17 (1872 ed.).[12]

The Founders understood the lessons of past eras, when these principles were not resolutely entrenched into the law. As a result, a "primary focus" of their efforts in drafting the Constitution and Bill of

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[12] http://lf-oll.s3.amazonaws.com/titles/2193/Beccaria_1476_Bk.pdf. Notably, "Beccaria's writings materially informed the Founding Fathers' attitudes and views of the provisions of the federal Bill of Rights." *Louis S. Rulli, Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111, 1115 n.2 (internal quotations and brackets omitted) ("*Excessive Punishment in Civil Forfeiture*").

Rights "was the potential for governmental abuse of its 'prosecutorial' power." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989). Based on past experiences, the Founders wanted a clear limit on "the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Id.* at 267. Among other models, the Founders turned to the English Bill of Rights of 1689, which was designed "to curb the excesses of [17th century] English judges" who were imposing "partisan" and "heavy fines on the King's enemies." *Id.*

But the Founders "feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured." *Ingraham v. Wright*, 430 U.S. 651, 665 (1977). Indeed, their "principal concern . . . appears to have been with the legislative definition of crimes and punishments." *Id.*

Against this general background, the Framers of the Bill of Rights began work on the Constitution's Eighth Amendment. Its text provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Amendment's language was taken, "almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the [aforementioned] English Bill of Rights of 1689." *Ingraham*, 430 U.S. at 664.

While Congress did not debate the Eighth Amendment's language directly to any meaningful

extent in 1791, *see Browning-Ferris*, 492 U.S. at 264, contemporary advocates spoke out and wrote approvingly about its principles. For example, during the original Virginia Ratifying Convention in 1788, Patrick McHenry argued that it would "depart from the genius of your country" to adopt a Constitution without a restriction on excessive fines. Patrick McHenry, *Debate in Virginia Ratifying Convention*, (June 16, 1788).[13] "[W]hen we come to punishments," McHenry continued, "no latitude ought to be left [to legislatures to] define . . . punishments without this control." *Id.* A prominent pre-ratification author likewise linked the importance of placing excessiveness-related constraints on both the federal and state governments:

> For the security of liberty it has been declared, "that excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted. . . ." These provisions are as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, . . . and seizing . . . property . . . as the other.

Louis S. Rulli, *Excessive Punishment in Civil Forfeiture*, 19 U. Pa. J. Const. L. at 1115 (quoting

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[13] http://press-pubs.uchicago.edu/founders/documents/amendVIIIs13.html.

Brutus II (Nov. 1, 1787), as reprinted in *The Complete Bill of Rights* 621 (Neil H. Cogan, ed., 1997)).

Given this "traditional understanding of protection from excessive fines as inherent in English fundamental law, and in light of the fact that protections against excessive fines are among the most ancient rights of the Anglo-American legal tradition, it can scarcely be argued that such rights are not 'deeply rooted in this Nation's history and tradition.'" Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 875 (2013) (citation omitted); *see also Klopfer v. State of North Carolina*, 386 U.S. 213, 223–24 (1967) (incorporating right that "has its roots at the very foundation of our English law heritage"); *Solem v. Helm*, 463 U.S. 277, 284–88 (1983) (observing that the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century").

Historic support for incorporation is also quantifiable. By 1791, the constitutions of Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia all contained prohibitions on excessive fines, as did the Northwest Ordinance of 1787. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. at 876. And by the year the Fourteenth Amendment was adopted, 35 states – accounting for nearly 92% of the population – had incorporated their own version of an excessive fines prohibition into their constitutions. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the*

Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 Tex. L. Rev. 7, 82 (2008).[14]

This is why, as Petitioner details (at 13-18 & n.5), many state and federal courts have concluded that it is "beyond serious dispute" that the Excessive Fines Clause applies to the States – particularly so given this Court's past statements to this effect. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (explaining that the entirety of the Eighth Amendment "is applicable to the States through the Fourteenth Amendment");[15] Pet. at 10, 21-23 & n.6. Yet because courts in a handful of states (*e.g.*, Michigan, Mississippi, and Montana), *id.* at 19-21, and federal jurisdictions, *see, e.g.*, *Garcia v. Wyoming*, 587 F. App'x 464, 469 (10th Cir. 2014), have concluded that the Excessive Fines Clause does not apply to the States, a definitive statement from this Court is the only way to end the "surprising amount of confusion"

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[14] In fact, prior to the Fourteenth Amendment, one prominent author had even argued for applying the Eighth Amendment's ban on excessive fines to the States of its own force. In his 1825 treatise, William Rawle wrote that the prohibition on excessive fines was "founded on the plainest principles of justice, and alike obligatory on the legislatures and judiciary tribunals of the states and of the United States." Nicholas M. McLean, *supra* n.8, at 901 (quoting William Rawle, *A View of the Constitution of the United States of America* 125 (1825)).

[15] *See also Miller v. Alabama*, 567 U.S. 460, 503 (2012) (Thomas, J., dissenting) ("The Eighth Amendment, made applicable to the States by the Fourteenth Amendment, provides that: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'") (citation omitted).

that now exists, *Reyes v. N. Texas Tollway Auth.*, 830 F. Supp. 2d 194, 206 (N.D. Tex. 2011).[16]

Finally, lest there be any doubt, courts are more than capable of making these determinations. A hallmark of the American constitutional system is the creation of "an independent judiciary [as] the ultimate reliance of citizens in safeguarding rights guaranteed by the Constitution" over and beyond the legislative and executive branches. *Levine v. United States*, 362 U.S. 610, 616 (1960).[17] This Court long ago recognized

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[16] There is a similar level of confusion among the scholarly community. *Compare* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147–48 (1986) (explaining that because "the disapproval of excessive fines is logically intertwined with the other two provisions of the [E]ighth [A]mendment, its applicability to the states seems clear"), *with* Nicholas M. McLean, *supra* note 8, at 875 ("it remains somewhat unclear whether the Supreme Court has in fact incorporated the Excessive Fines Clause to date.").

[17] Indeed, James Madison recognized that adoption of the Bill of Rights would bolster the role of the federal judiciary. He explained:

> [I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

"the duty of the courts to adjudge such penalties to be within the constitutional prohibition" of the Eighth Amendment. *In re Kemmler*, 136 U.S. 436, 446 (1890). In fact, "by broadly prohibiting excessive sanctions, the Eighth Amendment [actually] directs judges to exercise their wise judgment in assessing the proportionality of all forms of punishment." *Ewing v. California*, 538 U.S. 11, 32–35 (2003) (Stevens, J., dissenting).

In short, ample authority supports reversing the Indiana Supreme Court's decision, confirming that the Eighth Amendment applies to the States, and vesting the judicial branch with authority to apply the same uniform, centuries-old principles of fairness and proportionality that are applied to cases arising under federal law. *See Bajakajian*, 524 U.S. at 334-44.

B. Granting Certiorari Will Prevent Indiana, and Other States, from Ignoring an Essential Element of Ordered Liberty.

"The purpose of the Eighth Amendment . . . was to limit the government's power to punish," with the Excessive Fines Clause forming an integral part of the Amendment's three-part framework by "limit[ing] the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993)

James Madison, House of Representatives, (June 8, 1789), available at http://press-pubs.uchicago.edu/founders/documents/v1ch14s50.html.

(quoting *Browning-Ferris*, 492 U.S. at 265). It "would be anomalous indeed" if other sanctions under the Eighth Amendment were subject to review under federal constitutional principles but excessive fines were not. *Solem*, 463 U.S. at 289.

In today's world, state and local prosecutors have sought to extract grossly disproportionate fines from those parties – like corporations – who presumably have the resources to pay, rather than seeking more appropriate sanctions. But such schemes, which leave prosecutors unbound to fundamental constitutional principles of proportionality, defeat the broader goals behind the Eighth Amendment and this Court's decision to incorporate its other clauses against the States. This Court should not allow overzealous prosecutors and contingent fee counsel to effectively do away with fundamental constitutional rights.

CONCLUSION

Today the imperative for incorporating the Excessive Fines Clause against the States could scarcely be more clear. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). With excessive fines on the rise, and confusion and uncertainty reigning in the legal community, this case presents the Court with an opportunity to resolve an important constitutional issue and protect all Americans' fundamental right to liberty.

This Court should grant the petition.

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No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari to the Indiana Supreme Court

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections.

SUMMARY OF ARGUMENT

Nearly 150 years ago, in the wake of a bloody Civil War, the Fourteenth Amendment transformed the Constitution's protection of individual rights, adding to our nation's charter a sweeping new guarantee of liberty meant to secure "the civil rights and privileges of all citizens in all parts of the republic," *Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xxi (1866), and to keep "whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866) (Rep. Woodbridge).

Proposed in 1866 and ratified in 1868, the Fourteenth Amendment "fundamentally altered our

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), in order to "repair the Nation from the damage slavery had caused," *id.* at 807 (Thomas, J., concurring in part and concurring in the judgment), and to secure for the nation the "new birth of freedom" that President Abraham Lincoln had promised at Gettysburg. Central to that task was ensuring state adherence to the full range of individual rights enshrined in America's founding documents, including the liberties enumerated in the Constitution and Bill of Rights.

The Framers wrote the Fourteenth Amendment against the backdrop of a long history of state abridgement of fundamental rights. As Rep. Jehu Baker put it, the Amendment was "a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue." Cong. Globe, 39th Cong., 1st Sess. app. 256. The Framers were keenly aware that during slavery and in its aftermath many Southern states suppressed a host of basic freedoms. *Id.* at 2542 (Rep. Bingham) ("many instances of State injustice and oppression have already occurred in the State legislation of this Union"). Before the Civil War, "[t]he structural imperatives of the peculiar institution led slave states to violate virtually every right and freedom declared in the Bill [of Rights] . . . . Slavery bred repression." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 160 (1998). After the war, to retain their grip over the former slaves, governments across the South enacted Black Codes designed to coerce the freedmen back into the plantation labor system and prevent them from exercising the freedoms enjoyed by whites.

The Black Codes established a range of new crimes that were enforced through the infliction of "severe

penalties," Cong. Globe, 39th Cong., 1st Sess. 474 (Sen. Trumbull), including fines, forfeiture of property, corporal punishment, imprisonment, and forced labor, all "in punishment of crimes of the slightest magnitude." *Id.* at 1123 (Rep. Cook). Members of Congress lambasted these measures, highlighting among other things the outlandish fines imposed under the Black Codes. *See id.* at 516-17, 651, 1621. Lawmakers also decried the widespread denial of property rights to the former slaves. *See id.* at 94, 475, 588. Such measures were seen as abridgements of fundamental rights, which the Fourteenth Amendment was designed to secure against state infringement. The original meaning of the Fourteenth Amendment was thus to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766 (Sen. Howard).

As history shows, the Fourteenth Amendment was meant to effect a radical constitutional transformation, imposing upon the states an obligation to respect the individual liberties enumerated in the Bill of Rights. "[T]he chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States," *McDonald*, 561 U.S. at 762, and their "well-circulated speeches" informed the ratifying states and the public at large that the Amendment was meant to "enforce constitutionally declared rights against the States," *id.* at 833 (Thomas, J., concurring). The Framers, moreover, entrusted the courts with responsibility for vindicating the Amendment's vital new safeguards; indeed, among the "great fundamental rights" of citizens, they believed, was the ability "to enforce rights in the courts." Cong. Globe, 39th Cong., 1st Sess. 475 (Sen. Trumbull).

In this case, however, the Indiana Supreme

Court renounced that promise and abdicated its responsibility to faithfully interpret and apply the Fourteenth Amendment. Although this Court has developed "well established" standards for identifying which protections in the Bill of Rights apply to the states through that Amendment, *McDonald*, 561 U.S. at 750, the Indiana court refused to apply those standards or to engage at all in "the sort of Fourteenth Amendment inquiry required by [this Court's] cases." *Id.* at 758 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 620 n.23 (2008)). Instead, the court below simply announced that it would "elect" not to impose on Indiana the obligations of the Eighth Amendment's Excessive Fines Clause, and in the absence of a direct command from this Court would "decline" to "subject Indiana to a *federal* test." Pet. App. 9. As shown below, that holding is entirely at odds with the text and history of the Fourteenth Amendment and this Court's precedents. *Amicus* urges the Court to grant the petition and vindicate the constitutional design of the Framers of the Fourteenth Amendment, by holding that the Amendment incorporates the Excessive Fines Clause against the states.

ARGUMENT

I. The Fourteenth Amendment Was a Response to Rampant Infringement of Fundamental Liberties by the States, Including Deprivations of Property Rights and the Use of Severe Penalties

After the Civil War, "[t]he overriding task confronting Congress and the new President was to restore the states that had attempted to secede to their proper place in the Union." David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 383 (2008). Complicating this task, the states of the ex-Confederacy remained defiant in their suppression of

former slaves and their persecution of those who had opposed secession. "Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to determine whether, and on what conditions, those States should be readmitted to the Union." *McDonald*, 561 U.S. at 827 (Thomas, J., concurring). Composed of members of the House and Senate, the Committee was given both fact-finding powers and legislative jurisdiction: it took testimony and controlled the framing of constitutional amendments and legislation concerning Reconstruction. Based on its exhaustive investigation into conditions in the South, the Joint Committee submitted to Congress a report that "extensively catalogued the abuses of civil rights in the former slave States." *Id.* The report confirmed the systematic violation of fundamental rights by Southern states, demanding "changes of the organic law" to secure the "civil rights and privileges of all citizens in all parts of the republic." *Report of the Joint Committee* xxi.

Of central concern to the Joint Committee and other members of Congress were the Black Codes. Enacted in jurisdictions across the South after the war, these legislative measures represented an attempt to re-institutionalize slavery in a different guise—systematically violating the rights of the newly freed slaves to force them into conditions replicating the pre-war plantation system. Under "the barbarous codes which have been passed in all the rebel States," said one lawmaker, freedmen were in "a condition of nominal freedom worse than a condition of actual slavery." Cong. Globe, 39th Cong., 1st Sess. 1839 (Rep. Clarke); *see Report of the Joint Committee*, Pt. II at 218 ("it will be the purpose of their former masters to reduce them as near to a condition of slaves as it will be possible to do . . . . they would deprive them by severe

legislation of most of the rights of freedmen"); *id.* Pt. II at 4 (reporting testimony concerning Southern refusal "to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property"). As one observer put it, "the South is determined to have slavery—the thing, if not the name." Cong. Globe, 39th Cong., 1st Sess. 94 (Sen. Sumner) (quoting report sent to Congress).

Beginning in 1865, for instance, many localities "adopted ordinances limiting black freedom of movement, prescribing severe penalties for vagrancy, and restricting blacks' right to rent or purchase real estate and engage in skilled urban jobs." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 198 (1988); *see id.* at 200 ("Virtually all the former Confederate states enacted sweeping vagrancy and labor contract laws," which required freedmen to be contractually employed under terms supervised by the state.); Cong. Globe, 39th Cong., 1st Sess. 588 (Rep. Donnelly) ("The adult negro is compelled to enter into contract with a master, and the district judge, not the laborer, is to fix the value of the labor.").

The "centerpiece" of these Codes "was the attempt to stabilize the black work force and limit its economic options apart from plantation labor. Henceforth, the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers." Foner, *supra*, at 199; *see Report of the Joint Committee*, Pt. II at 240 (reporting testimony that "[t]he planters are disposed . . . to insert in their contracts tyrannical provisions, to prevent the negroes from leaving the plantation"); *see* Cong. Globe, 39th Cong., 1st Sess. 1839 (Rep. Clarke) (citing "lately passed laws calculated to virtually make serfs of the persons that the constitutional amendment made

free").

The Black Codes also denied property rights to the ex-slave. "It seemed everywhere quite determined upon that he should not be an owner of land." *Report of the Joint Committee*, Pt. II at 243; *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 588 (Rep. Donnelly) ("The black code of Mississippi provides that no negro shall own or hire lands in the State."). Personal property was seized from blacks by bands of whites who acted with tacit or overt government approval. *See id.* at 94 (Sen. Sumner) (quoting report describing "the militia robbing the colored people of their property" and weapons); *id.* (quoting report describing the torture of blacks as a "means of extorting from the freed people a confession as to where they have their arms and money concealed"). "We need protection for our person and property," implored the freedmen of Tappannock, Virginia, in a letter sent to the House of Representatives in December 1865. *Id.* at 516.

Blacks who failed to comply with these mandatory contractual obligations violated the *criminal* law, and such violations, like other infractions, were punished with harsh penalties that included imprisonment, corporal punishment, fines, forfeiture of private property, and forced labor. "If employers could no longer subject blacks to corporal punishment, courts could mandate whipping as a punishment for vagrancy or petty theft. If individual whites could no longer hold blacks in involuntary servitude, courts could sentence freedmen to long prison terms, force them to labor without compensation on public works, or bind them out to white employers who would pay their fines." Foner, *supra*, at 205; Cong. Globe, 39th Cong., 1st Sess. 588 (Rep. Donnelly) ("If he thinks the compensation too small and will not work, he is a vagrant, and can be hired out for a term of service at a rate . . . to be fixed by the judge.");

id. at 93 (Sen. Sumner) ("The lash is also prescribed as a means of enforcing contracts."); *id.* at 474 (Sen. Trumbull) ("They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery."); *id.* at 1123 (Rep. Cook) (citing "laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude").

A Louisiana ordinance read to the House of Representatives was typical. Among other things, it specified that a freedman who entered town limits without special permission would be punished by "imprisonment and two days' work on the public streets, or shall pay a fine of $2.50." Blacks found on the streets after 10 p.m. without a special pass were to be "imprisoned and compelled to work five days on the public streets, or pay a fine of five dollars," and if found on the streets after 3 p.m. on a Sunday, "imprisoned and made to work two days on the public streets, or pay two dollars." Preaching the Gospel without a license was punished by "the penalty of a fine of ten dollars or twenty days' work on the public streets"; a person carrying a firearm without special permission would "forfeit his weapons, and shall be imprisoned and made to work five days on the public streets, or pay a fine of five dollars"; and engaging in commercial exchanges of merchandise without special permission was punishable "under the penalty of the forfeiture of said articles, and imprisonment and one day's labor, or a fine of one dollar." Anyone who rented a house to blacks would "pay a fine of ten dollars for each offense." Cong. Globe, 39th Cong., 1st Sess. 516-17 (Rep. Elliot).

These measures were characteristic of those that swept the South. *See, e.g., id.* at 1621 (Rep. Myers) (Alabama's laws, "among other harsh inflictions[,]

impose an imprisonment of three months and a fine of $100 upon any one owning fire-arms, and a fine of fifty dollars and six months' imprisonment on a servant or laborer (white or black) who loiters away his time or is stubborn or refractory"); *id.* ("a vagrant in [Florida] shall be punished by a fine not exceeding $500 and imprisoned for a term not exceeding twelve months, or by being sold for a term not exceeding twelve months, at the discretion of the court"); *id.* at 651 (Rep. Grinnell) (reporting that "[a] white man in Kentucky may keep a gun," but "if a black man buys a gun he forfeits it and pays a fine of five dollars").

Formal distinctions between the liability of whites and blacks to fines and other punishments were, of course, supplemented by discriminatory application of the written law. A letter was read in the Senate, for instance, reporting that "in nine cases out of ten . . . where a white man has provoked an affray with a black, and savagely misused him, the black man has been fined for insolent language because he did not receive the chastisement in submissive silence, while the white man has gone free." Cong. Globe, 39th Cong., 1st Sess. 94 (Sen. Sumner).

As these examples illustrate, fines were used interchangeably and in combination with imprisonment and physical punishments to enforce the regime of the Black Codes. Accounts of these oppressive measures reached Congress in steady reports from the South. *See id.* at 1838 (Rep. Clarke) ("Every mail brings to us the records of injustice and outrage."). Lawmakers viewed these measures as violating core freedoms identified in the Bill of Rights, *see id.* at 1617 (Rep. Moulton) ("The constant and barbarous outrages committed by rebels in the South against the Union men and freedmen would fill volumes . . . . There is neither freedom of speech, of the press, or protection to life,

liberty, or property."), and they condemned these laws as abridgements of freedmen's fundamental liberties. "A law that does not allow a colored person to hold property . . . is certainly a law in violation of the rights of a freeman." *Id.* at 475 (Sen. Trumbull).

Congress first responded through legislation, enacting the Civil Rights Act of 1866 and later an expansion of the Freedmen's Bureau—both of which sought to safeguard property rights. *See* Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 ("citizens, of every race and color . . . shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens"); Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176-77 ("the right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, . . . shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery").

Proponents of these bills explicitly linked the freedoms denied to blacks in the South with the fundamental guarantees enshrined in America's founding documents. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 632 (Rep. Moulton) ("[T]he civil rights referred to in the bill are . . . the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of Independence, the right to personal liberty, the right to hold and enjoy property, to transmit property, and to make contracts. These are the great civil rights that belong to us all, and are sought to be protected by this bill."); *id.*

at 475 (Sen. Trumbull) (describing "[t]he great fundamental rights set forth in this bill" as including "the right to acquire property . . . to make contracts, and to inherit and dispose of property").

Congress's statutory responses to the Black Codes also took aim at excessive and discriminatory penalties. *See* Act of July 16, 1866, 14 Stat. at 177 ("no penalty or punishment for any violation of law shall be imposed or permitted because of race or color, or previous condition of slavery, other or greater than the penalty or punishment to which white persons may be liable by law for the like offence"); Act of Apr. 9, 1866, 14 Stat. at 27 ("citizens, of every race and color . . . shall have the same right . . . to full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains. and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding"); *id.* (making it a crime to "subject, under color of any law . . . any inhabitant of any State or Territory . . . to different punishments, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude . . . or by reason of his color or race, than is prescribed for the punishment of white persons").

Ultimately, however, Congress "deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks." *McDonald*, 561 U.S. at 775. As one Senator explained, the newly freed slaves needed to be guaranteed the "essential safeguards of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 1183 (Sen. Pomeroy).

II. The Fourteenth Amendment Transformed the Nation's Federal System To Prevent States from Violating the Freedoms Set Forth in the Bill of Rights

In order "to provide a constitutional basis" for the protection of fundamental rights in the South, *McDonald*, 561 U.S. at 775, the American people transformed our federal system by adopting the Fourteenth Amendment. The debates in Congress over the Amendment confirm that its first section was understood—and described to the ratifying public—as securing against state encroachment the fundamental liberties enumerated in the Constitution and the Bill of Rights.

In the House and Senate, "the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States," *id.* at 762, overturning the holding of *Barron v. Baltimore*, 32 U.S. 243 (1833), that only the federal government was bound by the Bill of Rights. *See Adamson v. California*, 332 U.S. 46, 72 (1947) (Black, J., dissenting) ("With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.").

Section One of the Fourteenth Amendment was the brainchild of Ohio congressman John Bingham, who served on the Joint Committee on Reconstruction. Introducing his draft of the Amendment in February 1866, "Bingham began by discussing *Barron* and its holding that the Bill of Rights did not apply to the States. He then argued that a constitutional amendment was necessary to provide 'an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the

citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person.'" *McDonald*, 561 U.S. at 829 (Thomas, J., concurring) (quoting Cong. Globe, 39th Cong., 1st Sess. 1089-90). "Bingham emphasized that § 1 was designed 'to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today.'" *Id.* (quoting Cong. Globe, 39th Cong., 1st Sess. 1088). This speech was "broadly distributed" in pamphlet form, bearing the subtitle "In Support of the Proposed Amendment to Enforce the Bill of Rights," and the speech received widespread newspaper coverage as well. *Id.* at 829-30 (Thomas, J., concurring).

The next month, Bingham "delivered a second well-publicized speech, again arguing that a constitutional amendment was required to give Congress the power to enforce the Bill of Rights against the States." *Id.* at 829 (Thomas, J., concurring). This speech was also "extensively published." Cong. Globe, 39th Cong., 1st Sess. 1837 (Rep. Lawrence).

In April, the Joint Committee unveiled a revised draft of the Amendment, which contained in its present form the sweeping guarantee of fundamental rights and liberties set forth in the Amendment's first section:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1; *see* Cong. Globe, 39th

Cong., 1st Sess. 2764. "Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that the Amendment protected all of 'the personal rights guarantied and secured by the first eight amendments of the Constitution.'" *McDonald*, 561 U.S. at 762 n.9 (quoting Cong. Globe, 39th Cong., 1st Sess. 2765). "Howard explained that the Constitution recognized 'a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution,' and that 'there is no power given in the Constitution to enforce and to carry out any of these guarantees' against the States." *Id.* at 831-32 (Thomas, J., concurring) (quoting Cong. Globe, 39th Cong., 1st Sess. 2765). "Howard then stated that 'the great object' of § 1 was to 'restrain the power of the States and compel them at all times to respect these great fundamental guarantees.'" *Id.* at 832 (Thomas, J., concurring) (quoting Cong. Globe, 39th Cong., 1st Sess. 2766). "News of Howard's speech was carried in major newspapers across the country[.]" *Id.* at 832-33 (Thomas, J., concurring).

"Finally, Representative Thaddeus Stevens, the political leader of the House and acting chairman of the Joint Committee on Reconstruction," also made explicit the import of the Amendment, stating "during the debates . . . that 'the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States.'" *Id.* at 762 n.9 (quoting Cong. Globe, 39th Cong., 1st Sess. 2459).

"As a whole, these well-circulated speeches indicate that § 1 was understood to enforce constitutionally declared rights against the States[.]" *Id.* at 833

(Thomas, J., concurring). "[N]ot a single person in either house spoke up to deny these men's interpretation of section I." Amar, *The Bill of Rights*, at 187; *see* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 934 (1986) ("The amendment's author, House and Senate floor leaders, and a number of proponents and opponents expressed the belief that it secured Bill of Rights guarantees. Not one senator or congressman denied that the amendment's framers and supporters intended to secure the Bill of Rights, or expressed an intention to exclude Bill of Rights guarantees from the rights Congress sought to secure.").

The Amendment's fate was not settled by Congress, of course, but by the states, where it was sent for ratification after both Houses approved it in June 1866. Ratification of the Fourteenth Amendment was the key political issue of the day. In the congressional elections of 1866, the Amendment was the main plank of the Republican platform, while "opposition to the Amendment [was] the focus of the Democratic platform," Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 Geo. L.J. 1275, 1279 (2013); *id.* (President Johnson's "sustained attempt to defeat the Amendment . . . helped shape public understanding of the proposed text and its impact on the autonomy of the states"). "More than anything else, the election became a referendum on the Fourteenth Amendment. Seldom, declared the *New York Times*, had a political contest been conducted 'with so exclusive reference to a single issue.'" Foner, *supra*, at 267 (quoting *N.Y. Times*, Oct. 11, 1866).

The 1866 elections resulted in a landslide victory for the Fourteenth Amendment's supporters in the Republican Party. *Id.* These decisive results turned the

tide in favor of ratification, which was finally achieved in July 1868. During the intervening months, the Amendment's proponents "continued to stress the need to protect the enumerated constitutional rights of American citizens against abridgment by the states," and that "'[t]his protection must be coextensive with the whole Bill of Rights.'" Lash, *supra*, at 1325 (quoting *N.Y. Times*, Nov. 15, 1866). As more and more states voted on ratification, "the idea that the amendment would bind the states to enforce personal liberties enumerated in the Bill of Rights was no longer (if it ever was) a disputed proposition. No one argued the point. The debate involved *whether* this was a good idea." *Id.* at 1326; *see* Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 147 (1986) (the records of the ratifying legislatures are sparse but "fully consistent with an intent to apply the Bill of Rights to the states").

In sum, "critical aspects of the Nation's history . . . underscored the need for, and wide agreement upon, federal enforcement of constitutionally enumerated rights against the States." *McDonald*, 561 U.S. at 840-41 (Thomas, J., concurring). To achieve that end, the Fourteenth Amendment was adopted to effect a radical constitutional transformation—one that would impose upon the states an obligation to respect certain fundamental rights, and in particular those individual liberties enumerated in the federal Bill of Rights.

III. The Indiana Supreme Court Abdicated Its Responsibility To Enforce the Protections Guaranteed by the Fourteenth Amendment

Consistent with the text and history of the Fourteenth Amendment, it has long been established that courts must ensure that challenged state action is consistent with the Amendment's guarantees. "[T]he right of a State to regulate the conduct of its citizens is

undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe." *The Slaughter-House Cases*, 83 U.S. 36, 114 (1872) (Bradley, J., dissenting). Indeed, the Framers of the Fourteenth Amendment viewed the "right to enforce rights in the courts" as one of the "great fundamental rights" possessed by all citizens. Cong. Globe, 39th Cong., 1st Sess. 475 (Sen. Trumbull). The Fourteenth Amendment's promise of liberty would be an empty one if courts could simply abandon their responsibilities and give states free rein to abrogate the liberty and property rights set forth in the Constitution and the Bill of Rights.

That is what the Indiana Supreme Court did here. Instead of applying the "well established" standards prescribed by this Court for identifying which of the protections in the Bill of Rights apply to the states through the Fourteenth Amendment, *McDonald*, 561 U.S. at 750, the court refused to analyze the matter at all—simply announcing that it would "elect" not to impose on Indiana the obligations of the Eighth Amendment's Excessive Fines Clause. Pet. App. 9. That decision cannot be squared with the text and history of the Fourteenth Amendment or this Court's precedents.

This Court has already "held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States." *McDonald*, 561 U.S. at 750. While this Court has not taken the position that the Fourteenth Amendment categorically applies the entire Bill of Rights to the states, it has adopted "a process of 'selective incorporation'" under which the Amendment's Due Process Clause has been found to "fully incorporate[] particular rights contained in the first eight Amendments." *Id.* at 763; *cf.*

Akhil Reed Amar, *America's Constitution: A Biography* 389 (2005) ("[S]keptics have raised important questions about the peculiar manner in which the Court eventually came to apply the Bill of Rights to the states .... But none of the skeptics' objections is a good argument against incorporation per se, as distinct from the particular manner in which the Court has effected and explained its doctrine."). Indeed, the Court long ago "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause," and only a "handful" of such rights have not received a definitive ruling from this Court. *McDonald*, 561 U.S. at 764-65; *see id.* at 765 n.13 ("We never have decided whether ... the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause." (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989))).

While this Court has not resolved the incorporation status of the Excessive Fines Clause, it has developed a "standard that is well established in our case law" for deciding whether any particular protection guaranteed by the Bill of Rights applies to the states through the Fourteenth Amendment. *Id.* at 750. "In answering that question," this Court has said, courts "must decide whether the right ... is fundamental to our scheme of ordered liberty, or ... deeply rooted in this Nation's history and tradition." *Id.* at 767 (emphasis omitted) (citations omitted).

When faced with Petitioner Timbs's constitutional challenge to his state's forfeiture laws, however, the Indiana Supreme Court flatly refused to conduct "the sort of Fourteenth Amendment inquiry required by [this Court's] cases." *McDonald*, 561 U.S. at 758 (quoting *Heller*, 554 U.S. at 620 n.23). Instead, after

observing that this Court has not "decide[d] the issue authoritatively," the court declared that "Indiana is a sovereign state within our federal system, and we elect not to impose federal obligations on the State that the federal government itself has not mandated." Pet. App. 8-9. In support of this pronouncement, the court explained that "we decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." *Id.* at 9.

This reasoning is indefensible. "Our federal system 'charges state courts with a coordinate responsibility' to give effect to all Americans' federally protected rights." Pet. 26 (quoting *Howlett v. Rose*, 496 U.S. 356, 367 (1990)); *see also* Proclamation No. 13, 15 Stat. 708, 710 (July 28, 1868) ("the legislature of Indiana ratified [the Fourteenth Amendment] January 29th, 1867"). It is irrelevant that adherence to the guarantees contained in our national charter may limit the range of state action; indeed, that is the very point of those federal guarantees. As this Court has explained: "Incorporation always restricts experimentation and local variations," but that is simply because "'[t]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.'" *McDonald*, 561 U.S. at 790 (quoting *Heller*, 554 U.S. at 636).

Treating the protection against excessive fines as a second-class right is particularly inexcusable given the history, recounted above, of the use of fines to subordinate African Americans and force them to work for their former masters. The Indiana Supreme Court's interpretation of the Fourteenth Amendment would allow states to impose any fines they wish, no matter how excessive and out of line with fundamental principles of justice and fair play. That cannot be right.

What the court below should have done is ask, as this Court's cases require, whether the right to be free of excessive fines "is fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition." *Id.* at 767 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), and *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (emphasis omitted). To answer those questions, this Court has looked to ancient legal codes, the 1689 English Bill of Rights, the common law and its prominent expounders such as Blackstone, the views of the American colonists in the Revolutionary era, early American state constitutions, records of the drafting and ratifying of the Constitution and Bill of Rights, and evidence surrounding the adoption of the Fourteenth Amendment. *See id.* at 767-78. By these metrics, as the Petition demonstrates, freedom from excessive fines is "among those fundamental rights that are essential to our system of ordered liberty," Pet. 25, a vital protection against "the potential for governmental abuse of its prosecutorial power," *Browning-Ferris Indus.*, 492 U.S. at 266 (quotation marks omitted). Such freedom is therefore one of the "fundamental guarantees" that it was "the great object" of the Fourteenth Amendment to secure against state encroachment. Cong. Globe, 39th Cong., 1st Sess. 2766 (Sen. Howard).

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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March 5, 2018

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No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct, in both state and federal court. NACDL was founded in 1958, and has a nationwide membership of many thousands of direct members, and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. It is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files its brief in this case because of its great importance to criminal defendants throughout all fifty states, many of whom currently have no redress under the Constitution for what are by definition gross and disproportionate abuses of the state's power to levy fines.

INTRODUCTION AND SUMMARY OF ARGUMENT

The entitlement to be free from excessive fines is a fundamental right that predates and undergirds both the Eighth and the Fourteenth Amendments. The legal pedigree of this principle as a judicially enforceable right can be traced from the Eighth Amendment

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[1] The parties have given blanket consent to the filing of amicus briefs in this matter and have received notice of NACDL's intent to file this brief. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

and its state analogues through Blackstone and the English Bill of Rights to the signing of Magna Carta in 1215.

For the founders, the principles of moderation and proportionality embodied in this guarantee were not only a matter of plain justice and fundamental right, they were also necessary for the maintenance of a free and civilized society. This was because the founders (rightly) believed that excessive punishment not only injured the aggrieved person, but also coarsened society as a whole. As Montesquieu explained, "where men are deterred only by cruel punishments, we may be sure that this must, in a great measure, arise from the violence of the government which has used such penalties for slight transgressions." Montesquieu, *Spirit of Laws*, bk.6, ch. 12 (1748); see also Thomas Jefferson, A Bill for Proportioning Crimes and Punishments (1778); James Wilson, *Lectures on Law* (1804), reprinted in 1 James Wilson, *Collected Works of James Wilson* 348 (Kermit L. Hall & Mark David Hall, eds., Liberty Fund 2007). By codifying this principle in the Constitution, moreover, the framers ensured that judges would be able to serve as a necessary check on harsh legislation and overzealous prosecution.

This case presents a single question: does this fundamental guarantee apply to the States through the Fourteenth Amendment? The Indiana Supreme Court below said "no," acknowledging that it was deepening a split of authority that would ultimately have to be addressed by this Court. Like the other state courts that have held that the Excessive Fines Clause does not apply to the states, however, the Indiana Supreme Court's decision was not based on an analysis of the meaning of the Constitution or this Court's incorporation jurisprudence. Instead, it

grounded its conclusion on a single fact: that this Court had not yet "definitively decided" the question.

This is a troubling development. The Constitution is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. It is therefore incumbent upon both state and federal courts to fully and fairly consider the merits of a party's constitutional arguments, not merely to look to see whether this Court has binding precedent on point. As Justice Story explained more than 200 years ago:

> It is obvious that this obligation is imperative upon the state judges . . . . From the very nature of their judicial duties, they [are] called upon to pronounce the law applicable to the case in judgment.

Martin v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816).

For people like Timbs, the consequences of such unreasoned decisions are profound. Indeed, in an era where onerous fines are increasingly levied by states through the constitutionally dubious rubric of civil asset forfeiture, the federal Constitution's prohibition on excessive fines is now more important than ever.

This case thus presents matters of great doctrinal and practical importance, and as explained by Petitioner, it is an excellent vehicle, meeting all of the requirements for "cert.-worthiness."

ARGUMENT

I. IN REFUSING TO ANALYZE WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO THE STATES, THE INDIANA SUPREME COURT IGNORED ITS OBLIGATION TO ENFORCE THE U.S. CONSTITUTION.

The Indiana Supreme Court's refusal to consider the merits of Timbs' Eighth Amendment claim absent a clear holding from this Court is incompatible with that charter's status as "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Indeed, it is a failure to comply with the fundamental judicial duty "not only to give judgment but to expound law." Philip Hamburger, *Law and Judicial Duty* 614 (2008); see also *Tyler* v. *Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 707 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment) (Judges are bound by their "oath to uphold and defend the Constitution, and [they] must therefore show restraint when that document restrains [them] and be active when it commands action. [They] must, in other words, say 'what the law is.'").

That the Indiana Supreme Court is a creature of state, rather than federal, law is no excuse. As Alexander Hamilton explained, under the federal Constitution, "the national and State [court] systems are to be regarded as one whole." The Federalist No. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *Claflin* v. *Houseman*, 93 U.S. 130, 136–37 (1876) (state courts have concurrent jurisdiction over claims arising under the federal Constitution when Congress has not bestowed exclusive jurisdiction on federal courts). And state courts are thus "not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States." *Martin*,

14 U.S. (1 Wheat.) at 340–41; see also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 489 (1954) ("The law which governs daily living in the United States is a single system of law."). "From the very nature of their judicial duties," state judges, like their federal colleagues, are "called upon to pronounce the law applicable to the case in judgment." *Martin*, 14 U.S. (1 Wheat.) at 340.

Thus, "in the exercise of their ordinary jurisdiction, state courts" hear "cases arising under the [C]onstitution," and must therefore interpret the Constitution in those cases just as federal courts would. See *id.* at 342; see also Hart, *supra*, at 507 ("The supremacy clause, of course, makes plain that if a state court undertakes to adjudicate a controversy it must do so in accordance with whatever federal law is applicable."). "State courts ordinarily fulfil such obligations without question." *Hart*, *supra*, at 516. For otherwise, the Supremacy Clause "would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue." *Martin*, 14 U.S. (1 Wheat.) at 342.

This is hardly a rare occurrence: state courts frequently handle claims involving federal constitutional law, especially in the criminal context. This includes, for instance, applications of the Fourth Amendment, such as determining whether searches or seizures were reasonable, see, *e.g.*, *Utah* v. *Strieff*, 136 S. Ct. 2056, 2064 (2016) (reversing judgment of the Utah Supreme Court that evidence was inadmissible under the Fourth Amendment); the Fifth Amendment, such as with issues of self-incrimination and double jeopardy, see, *e.g.*, *Evans* v. *Michigan*, 568 U.S. 313, 330 (2013) (reversing judgment of the Supreme Court of Michigan in a case involving the

Double Jeopardy Clause of Fifth Amendment); the Sixth Amendment, such as matters considering the rights to counsel, speedy trial, and confrontation, see, *e.g.*, *Peña-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 871 (2017) (reversing and remanding a case involving interpretation of the Sixth Amendment "fair trial" right to the Supreme Court of Colorado); the Eighth Amendment, such as issues turning on whether there was excessive bail or a cruel and unusual punishment, see, *e.g.*, *Moore* v. *Texas*, 137 S. Ct. 1039, 1053 (2017) (vacating judgment and remanding a case involving application of the Eighth Amendment to the Texas Court of Criminal Appeals); and even Fourteenth Amendment due process claims, see, *e.g.*, *Nelson* v. *Colorado*, 137 S. Ct. 1249, 1258 (2017) (reversing, finding that Colorado's Exoneration Act violated the Fourteenth Amendment, and remanding to the Colorado Supreme Court). In these and many other areas, criminal defendants depend upon state judges to give serious attention to the constitutional arguments raised by counsel, regardless of whether this Court has spoken to that particular issue, and regardless of whether it is an easy or difficult question. Criminal defendants, moreover, do not get to decide whether they are prosecuted in state or federal court. There is, for example, no right of removal for a defendant facing charges in state court.

The importance of state courts' fully considering a criminal defendant's claims can be seen in how deferential federal courts are to state court decisions when considering federal habeas corpus petitions. A federal court can grant an application for a writ of habeas corpus only if the state decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," or if the decision "was based on an unreasonable determination of the facts."

28 U.S.C. § 2254(d). This deference assumes that the "considered conclusions of a coequal state judiciary" deserve "great weight" from the federal courts. *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985). Thus, "federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." *Williams* v. *Taylor*, 529 U.S. 362, 383 (2000). They must instead "attend closely to those considered decisions, and give them full effect when their findings and judgments are consistent with federal law." *Id.* In other words, federal courts assume that state courts are engaging in the same endeavor as they are in interpreting and applying the Constitution. As this reasoning indicates, when state courts refuse to fully consider constitutional claims raised in good faith, it is criminal defendants who suffer. See, *e.g.*, *Lafler* v. *Cooper*, 566 U.S. 156, 173 (2012) (finding that state court "identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it," and that federal courts could thus grant relief to defendant).

This case illustrates these concerns. The Indiana Supreme Court gave no attention to the underlying constitutional issue, concluding instead that the wiser course of action was simply to "decline to find or assume incorporation until the Supreme Court decides the issue." Opinion — On Petition to Transfer from the Indiana Court of Appeals at 5, *State* v. *Tyson Timbs*, No. 27S04-1702-MI-70 (Ind. Nov. 2, 2017). It gave only two, conclusory reasons for this decision. First, it read this Court's acknowledgement that it had "never decided whether the . . . Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause" as somehow indicating that this guarantee did not apply to the

states. *Id.* at 4-5 (quoting *McDonald* v. *City of Chicago*, 561 U.S. 742, 745 n.13 (2010)). And second, it "elect[ed] not to impose federal obligations on the State," to avoid adopting "a *federal* test that may operate to impede development of [Indiana's] own excessive-fines jurisprudence." *Id.* at 6.

But nothing in this Court's jurisprudence suggests that *McDonald* can be fairly read as indicating that this Court has concluded that the Excessive Fines Clause is inapplicable to the states—quite the opposite is the case. See, *e.g.*, *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014) (stating that the Eighth Amendment's prohibition on excessive bail, on excessive fines, and on cruel and unusual applies to the states). And it is odd to say that a state court's *refusal* to exercise its independent role as an expositor of the federal Constitution somehow serves the interests of federalism.

Unfortunately, Indiana is not alone in this approach. Other state courts examining the Excessive Fines Clause have done much the same, assuming either the guarantee has or has not been incorporated without extended discussion. See, *e.g.*, *Pennsylvania* v. *1997 Chevrolet*, 160 A.3d 153, 162 n.7 (Pa. 2017) (assuming Excessive Fines Clause applied); *Pub. Emp. Ret. Admin. Comm'n* v. *Bettencourt*, 47 N.E.3d 667, 672 n.7 (Mass. 2016) (same); *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420 (Cal. 2005), *as modified* (Jan. 18, 2006) (same); *Ex parte Kelley*, 766 So. 2d 837, 840 (Ala. 1999) (same); *People ex rel. Waller* v. *1989 Ford F350 Truck*, 642 N.E.2d 460, 464–65, 467 (Ill. 1994) (same). Even federal courts have done so. See, *e.g.*, *Hamilton* v. *City of New Albany, Indiana*, 698 F. App'x 821, 827 (7th Cir. 2017) (assuming Excessive Fines Clause applied); *Cripps* v. *La. Dep't of Agric. and Forestry*,

819 F.3d 221, 234 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 305 (2016) (same); *Discount Inn, Inc.*, v. *City of Chicago*, 803 F.3d 317, 320 (7th Cir. 2015) (same); *Qwest Corp.* v. *Minn. Pub. Utils. Comm'n*, 427 F.3d 1061, 1069 (8th Cir. 2005) (same); *Wright* v. *Riveland*, 219 F.3d 905, 915 (9th Cir. 2000) (same).

The time is therefore ripe for this matter to be considered, and for this Court to give guidance not only on the substance of the Constitution, but also on lower courts' obligations to interpret and apply it.

II. THE ABUSE OF CIVIL ASSET FORFEITURE BY STATES LIKE INDIANA UNDERSCORES THE PRACTICAL IMPORTANCE OF THIS CASE.

Time has not laid to rest the founding-era fears of excessive fines. Indeed, the rise of civil asset forfeiture—the origin of the fine in this case—has made the issue more important than ever. As Justice Thomas recently pointed out, aggressive use of forfeiture proceedings has in recent decades become a favorite means of levying fines and is a practice that is often oppressive, unfair, and constitutionally dubious in its own right. *Leonard* v. *Texas*, 137 S. Ct. 847 (2017) (Thomas, J., statement respecting the denial of certiorari); see also *Forfeiture Reform*, Nat'l Ass'n of Criminal Defense Lawyers (2017), https://www.nacdl.org/forfeiture/. (Forfeiture "represents one of the most fundamental threats to the individual liberties of those accused of criminal activities as well as citizens not charged with any crime . . . . [It] tears at the heart of justice and fairness in our system.").

Law enforcement and prosecutors typically defend asset forfeiture as providing a necessary supplement to their bottom line. But whatever the merits of this

argument might be in the abstract, even a brief overview of current forfeiture practice demonstrates just how far out of hand things have gotten in practice.

To begin with, the system has created perverse incentives for law enforcement that have become internalized in the way police and prosecutors think and talk about forfeiture. Consider, for example, the remarkably candid exchange at a recent Columbia, Missouri Citizens Police Review Board meeting on the issue:

> **Board Member Daniel K. Jacob:** "How do you decide forfeiture funds?"
>
> **Police Chief Ken Burton:** "You know, it's usually based on a need. Well, I take that back. . . . Yeah, it's—there's some limitations on it. You know, it's, um, actually there's not really on the forfeiture stuff. It's just—we just usually base it on something that **would be nice to have**, that we can't get in the budget, for instance. Though, y'know, we try not to use it for things that we need to depend on, y'know, 'cause we need to go ahead and have those purchased, but it's kind of like **pennies from heaven**, y'know, it **gets you a toy or something that you need**, is the way we typically look at it."[2]

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[2] LastWeek Tonight, *Civil Forfeiture: Last Week Tonight with John Oliver (HBO)*, YouTube (Oct. 5, 2014), https://youtu.be/3kEpZWGgJks?t=537 (emphases added); see also Citizens Police Review Board Minutes (Nov. 14, 2012), http://www.como.gov/Council/Commissions/downloadfile.php?id=7548&bcid=14; Heart Beat Staff, *'PENNIES FROM HEAVEN': CoMo Police Chief's Remarks Raise Nationwide Hackles*, The Columbia Heart Beat (Oct. 7, 2014), http://www.columbiaheartbeat.com/index.php/crime/932-100714.

Such "toys," moreover, often have little to do with the legitimate work of law enforcement. To pick an extreme example, a recent investigation by the Massachusetts state auditor discovered that the district attorney's office had used forfeiture funds to purchase a *Zamboni machine*, dryly adding that she "could not determine . . . the law-enforcement purpose it serves" or even where it was located.[3]

Such chicanery does not serve any legitimate law-enforcement interest. But the cost to ordinary citizens, by contrast, is very real. Consider the experience of New Jersey resident George Reby. While driving through Tennessee on his way to purchase a vehicle in cash, he was pulled over by police—after he consented to a search, the officer took all $22,000 on the theory that "common people do not carry this much U.S. currency," and Reby must have been on his way to facilitate drug trafficking. Despite Reby's protestations and offers to show his bid on the vehicle, and despite prosecutors never charging Reby with a crime, and despite the officer admitting that he didn't know why he didn't credit Reby's defense, the officer confiscated the cash anyway. *Civil Forfeiture: Last Week Tonight with John Oliver*. "Luckily for [Reby], he was able to pursue the case with the help of an attorney." *Id.* Many others, however, are not so fortunate.

Members of Congress and the courts have often expressed concern about the government's sharp practices in this area. See, *e.g.*, *Federal Asset Forfeiture: Uses and Reforms: Hearing Before the Subcomm. on*

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[3] Commonwealth of Mass. Office of the State Auditor Suzanne M. Bump, Official Audit Report-Issued Feb. 15, 2013 (2013), https://www.mass.gov/files/documents/2016/08/ws/201212623j.pdf.

Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary, 114th Cong. 1, 3 (2015) (statement of Rep. James Sensenbrenner, Chairman, Subcomm. on Crime, Terrorism, Homeland Security, and Investigations) ("It is hard to believe this can happen in America. The Government is seizing billions of dollars of cash and property from Americans, often without charging them with a crime. . . . It is no wonder why my former colleague, Henry Hyde, described civil asset forfeiture as 'an unrelenting Government assault on property rights, fueled by a dangerous and emotional vigilante mentality that sanctions shredding the U.S. Constitution into meaningless confetti.'"); *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 81 (1993) (Thomas, J., concurring in part and dissenting in part) ("[L]ike the majority, I am disturbed by the breadth of new civil forfeiture statutes such as 21 U.S.C. § 881(a)(7), which subjects to forfeiture *all* real property that is used, or intended to be used, in the commission, or even the *facilitation*, of a federal drug offense."); *United States* v. *All Assets of Statewide Auto Parts*, 971 F.2d 896, 905 (2d Cir. 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes."); *State* v. *Timbs*, 62 N.E.3d 472, 478 (Ind. Ct. App. 2016) (Barnes, J., dissenting), *rev'd*, 84 N.E.3d 1179 (discussing "the overreach some law enforcement agencies have exercised in some of these cases. Entire family farms are sometimes forfeited based on one family member's conduct, or exorbitant amounts of money are seized."). But despite these concerns, both Congress and the courts have been largely unwilling or unable to place any meaningful constraints on this practice.

The protection of the Excessive Fines Clause is one of the few exceptions. See *Austin* v. *United States*, 509 U.S. 602, 622 (1993). But it remains only a paper barrier in those states that have refused to give it effect. This petition is a case in point. Timbs' crime was of a relatively minor nature—a class D felony arising out of a minor drug-dealing incident—and the trial court's sentence was lenient: one year of home detention followed by five years of probation and roughly $1,000 in court costs. The forfeiture of Timbs' Land Rover—prosecuted before a civil tribunal by a private lawyer working on a contingency fee basis—was by contrast very harsh as the vehicle was worth approximately four times the maximum criminal penalty. See Petition Appendix 20-21, 30 at ¶ 9, *Timbs* v. *Indiana*, No. 17-1091 (Jan. 31, 2018). Incorporation of the Eighth Amendment is needed to provide at least one critical and constitutional check on such government overreach.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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March 5, 2018

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No. 17-1091

In the Supreme Court of the United States

TYSON TIMBS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

BRIEF OF *AMICI CURIAE* PROFESSORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have given blanket consent to the filing of *amicus* briefs.

(2000); *Escalating the War on Drugs: Causes and Consequences*, 20 Stan. L. & Pol'y Rev. 293 (2009); *The Allocation of Police in Handbook on the Economics of Crime* (B. Benson & P. Zimmerman, eds. 2010); and *Predatory Public Finance and the Evolution of the War on Drugs* in *For Your Own Good: Taxes, Paternalism, and Fiscal Discrimination in the Twenty-First Century* (A. Hoffer & T. Nesbit, eds. 2018).

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SUMMARY OF ARGUMENT

State and local governments have been levying greater and greater fines and relying heavily on forfeitures in recent years, often at the expense of people who can least afford to pay. Fines and forfeitures are punishments, but they can also make money for cities and states, which gives governments an incentive to increase these punishments to excessive levels.

The Framers recognized this danger, and included the Excessive Fines Clause in the Bill of Rights to prevent such abuses. But, partly because the Clause has not yet been incorporated against the states, many states and cities are indeed levying excessive fines and forfeitures.

Some fine the poor more often and in greater amounts, and throw those who cannot pay into what has been described as modern-day debtor's prisons. Forfeiture practices also hit financially vulnerable communities particularly hard. And because this is a financially profitable enterprise, it is often also politically profitable: many who bear the brunt of fines and forfeitures lack the political power to resist them. The government knows this, and also knows that raising broadly applicable taxes instead of raising revenue from fines and forfeitures would likely spur a political backlash.

But the right to be free from excessive fines and forfeitures[2] is a basic right of all Americans, recognized by the Framers as no less important than its Eighth Amendment siblings, the right to be free from cruel and unusual punishments and from excessive bail (as well as other fundamental rights, such as those secured by the First and Second Amendments). The Excessive Fines Clause and the protection against excessive fines should be recognized as a right secured by the federal Constitution against state transgressions, and as a bulwark against the states' financial and political incentives to increase fines and forfeitures more and more.

ARGUMENT

I. This case merits the Court's attention because unmanageable fines sharply affect the lives of many Americans

A. Excessive fines particularly harm poor Americans

Fines are the most common form of punishment used by local, state, and federal governments.[3] And their effect is not just broad but deep: they can drive

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[2] The Court has previously held that forfeitures constitute fines for the purposes of the Excessive Fines Clause. *See Austin* v. *United States*, 509 U.S. 602 (1993) (civil forfeitures); *Alexander* v. *United States*, 509 U.S. 544 (1993) (criminal forfeitures).

[3] Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards & Alexes Harris, *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 Ann. Rev. Criminology 471, 472 (2018); *see also* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. Ill. L. Rev. 1175, 1186-96.

poor Americans into a vicious cycle of growing economic disaster.

A fine that would be bearable (even if constitutionally excessive) to many of us may well be beyond a poor person's ability to pay. People's failure to pay promptly may lead to still greater fees and surcharges, and can harm their credit, which can make it harder for them to find stable housing and employment. The accumulated fees may also lead to jail time for failure to pay, or other penalties such as the loss of a driver's license—which may in turn cost people their jobs, particularly in rural or other areas with limited or no access to public transportation. All this makes it even harder for them to pay their ever-growing debt, a debt that began with the original fine but that continues to climb indefinitely.

Indeed, much of the burden stemming from fines is generally borne by the poorest citizens, who often accrue "poverty penalties" that may sharply exceed the monetary value of the original fine: late fees, interest fees, or administrative fees such as fees for entering into a payment plan.[4] Such poverty penalties are traps—easily stepped over by the majority of citizens who are able to pay, but serious obstacles with real consequences for those who are not. In some cases, debtors have been forced to choose between "basic

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[4] Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2, 2-8 (2018); Criminal Justice Policy Program at Harvard Law Sch., *Confronting Criminal Justice Debt: A Guide for Policy Reform* 15 (2016), http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf.

necessities such as food, hygiene, and housing on the one hand, and making payments against their economic sanctions on the other."[5] In others, debtors are simply unable to pay the fines at all. And these problems also disproportionately affect black and Hispanic communities, as well as the poor of all races.[6]

The various fines, surcharges, fees, and costs that the government may impose in a given case can effectively stack up on each other, exacerbating what was already unmanageable debt. For Harriet Cleveland of Alabama, for example, the stacking of sanctions meant that, despite sustained efforts to pay, she could never overcome the debt imposed by a court for driving without insurance or a license.[7]

The court sentenced her to pay a fine and court costs, and placed her on private probation with a $40 per month supervision fee.[8] Unable to find regular employment, Ms. Cleveland did what she could to pay—including turning her entire income-tax rebate over to the probation company, taking out a title loan on her car, "rent[ing] an empty room in her home to

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[5] Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 293 (2014).

[6] *See, e.g.*, Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 152 (2016).

[7] Sarah Stillman, *Get Out of Jail, Inc.*, New Yorker 49 (June 23, 2014).

[8] *Id.* The government benefits financially when partnering with private probation and collections companies, both through collecting more money and because privatization relieves the government of the need to expend tax dollars for privatized services. *See* Colgan, *supra* note 4, at 28-25.

an elderly stranger with dementia," "sift[ing] through neighbors' trash for soda cans to cash in at the scrap yard," and even stealing $50 from her son's backpack and scrap metal from abandoned homes—but her debt still jumped from a few hundred dollars to $4,713 in four years.[9] When the probation company turned her file back over to the state, the state tacked on even more administrative fees and surcharges.[10] Like so many others, Ms. Cleveland had no meaningful ability to extricate herself from this punishment.

Indeed, some states systematically target poor people with fines. ArchCity Defenders, a nonprofit legal aid organization based in St. Louis, Missouri, found that local governments in Ferguson and other municipalities were operating

> on the backs of their poorest and most politically vulnerable citizens. The municipalities appeared to be targeting low-income and black communities with these practices. For example, fines were collected at rates more than fifteen times higher in one low-income, majority-black community than in a more affluent neighboring municipality. Ferguson was among the three worst offenders.[11]

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[9] Stillman, *supra* note 7, at 49-50, 53-54.

[10] *See id.*

[11] Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 Wm. & Mary L. Rev. 1171, 1174-75 (2017) (footnotes omitted); *see also* U.S. Dep't of Justice Civ. Rts. Div., *Investigation of the Ferguson Police Department* 52 (Mar. 4, 2015) (describing the fines imposed for minor offenses in Ferguson), https://www.justice.gov/

Nor are states necessarily deterred by the difficulty of collecting fines (however multiplied through late fees) from the poor: the threat of jail time can often be used to collect the money "from the families and friends of those arrested who wished to save their loved ones from languishing in jail."[12] (You can't get blood from a stone, but maybe from the stone's friends.) And because poor citizens are less likely to vote, and to have access to other forms of political power, governments may find it easier to target fines against them. Meanwhile, as Ms. Cleveland discovered, politically influential private entities play a role in the money-making enterprise, stacking the deck further against the likelihood of meaningful resistance being brought to bear outside the courts.

Were the federal government to engage in such schemes to raise revenue through excessive fines, the Excessive Fines Clause would bar fines that are "gross[ly] disproportionat[e]" to the severity of the offense. *United States* v. *Bajakajian*, 524 U.S. 321 (1998). But when fines are imposed by those states whose courts have refused to incorporate the Clause—or by the many cities or counties within those states—no federal constitutional protection is available.

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sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[12] *Id.* at 1204. Such jailing of people who are unable (rather than unwilling) to pay may be separately unconstitutional under *Bearden* v. *Georgia*, 461 U.S. 660 (1983); but if courts are barred from imposing excessive fines in the first place, that would yield much less occasion for such unconstitutional jailing. Colgan, *supra* note 11, at 1223-24 & n.302.

B. Excessive fines often lead to losses of licenses and other benefits, and to destroyed credit

Excessive, unaffordable fines often lead to the loss of government benefits such as housing assistance, supplemental security payments, and food stamps.[13] Failing to pay fines can also lead to the government revoking one's driver's license.[14] That in turn makes it harder for a person to get to work, to keep a job, and thus to earn money to pay the fines—which will then end up snowballing because of the failure to promptly pay. Nonpayment of criminal debt may also result in the denial of occupational licenses, likewise making it harder to get or keep a job.[15] And ongoing

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[13] Some states have made it a violation of parole or probation for a person to not pay his fines. When one violates parole, one also loses government benefits. *See, e.g.*, 42 U.S.C. § 608(a)(9)(A); 7 U.S.C. § 2015(k)(1); 42 U.S.C. § 1437d(l)(9); 42 U.S.C. § 1382(e)(4)(A)(ii).

[14] Lawyers Comm. for Civil Rights of the San Francisco Bay Area, *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California*, 9 (2016), http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf; Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons.

[15] Colgan, *supra* note 4, at 80-81; *see also, e.g.*, Mo. Rev. Stat. § 302.755(17) (disqualifying use of a commercial driver's license for "failure to . . . pay"); Utah Code Ann. § 41-3-201(9)(a) (denying issuance of salvage license until full payment of restitution); Va. Code Ann. § 54.1-2813 (limiting eligibility for funeral services license until applicant "has successfully fulfilled all condi-

criminal debt can also destroy a debtor's credit, making it difficult to secure stable employment or housing. As the Washington Supreme Court explained,

> The court's long-term involvement in [debtor's] lives [during collections] inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their [criminal debt]. . . . This active record can have serious negative consequences on employment, on housing, and on finances. [Criminal] debt also impacts credit ratings, making it more difficult to find secure housing.[16]

Excessive fines thus put financially vulnerable people into increasingly precarious circumstances. For many, their criminal debts can be effectively perpetual even for minor offenses.

C. Unmanageable fines often especially burden juvenile offenders

Unmanageable fines particularly harm poor youth and their families. They are assessed poverty penalties just as adults are,[17] but usually lack the re-

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tions of sentencing, been pardoned, or has had his civil rights restored").

[16] *State* v. *Blazina*, 344 P.3d 680, 684 (Wash. 2015) (citation omitted).

[17] For instance, juveniles may be responsible for paying court expenses, public defender fees, evaluation and testing costs, treatment costs, health care costs, GPS monitoring costs, and cost of care. *See* Jessica Feierman, Naomi Goldstein, Emily Haney-Caron & Jaymes Fairfax Columbo, *Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice*

sources to pay them; the practical cost is thus often borne by their parents, who are often already burdened with all the expenses of parenthood. Such sanctions thus "cause families difficulty 'surviving on a day to day basis,'"[18] sometimes forcing them to choose between buying groceries and paying their fines.[19] And excessive fines on juveniles may also have spillover effects on the juveniles' siblings. Forced to pay off one child's court fines, families may not have enough money for their other children's school clothes or college tuition.[20]

Excessive fines also appear to increase adolescent recidivism. A recent study found that imposing restitution, imposing higher economic sanctions, and continuing debt even when a case is closed "all significantly increased the odds of a youth recidivating. . . . even after controlling for relevant youth demographics and case characteristics variables."[21] Often, juveniles who fail to pay fines may be jailed, have their driver's license revoked, or be prevented from expunging their records.[22] This traps them in

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System 5, 13-15 (Juvenile Law Center 2016), https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf.

[18] *Id.* at 6.

[19] *Id.* at 7.

[20] *Id.*

[21] Alex R. Piquero & Wesley G. Jennings, *Justice System–Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 Youth Viol. & Juv. Just. 325, 334 (2017).

[22] Feierman, *supra* note 16, at 23.

the juvenile justice system, with little hope of getting out.[23]

The lingering effects of failing to pay juvenile fines, which include criminal contempt, probation violations, or additional fees, may even follow the juveniles into adulthood in the form of property liens, ineligibility for expungement, and destroyed credit.[24] And black and Hispanic youth and their families also appear to be disproportionately hurt by the juvenile system's fines. Even when the rate of juvenile crimes is similar among minority youth and white youth, minority youth are more likely than white youth to still owe money at the closure of their case.[25]

II. Like fines, forfeitures are ubiquitous and can be financially devastating

Forfeiture practices are widespread throughout the country—and financially lucrative. Many such seizures come out of "civil asset forfeiture" programs, in which the government secures a forfeiture without first obtaining a conviction, and at times without ever having filed criminal charges.[26] The drive to use forfeiture to raise revenue may incentivize policing of offenses where seizures of cash or property are most

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[23] *Id.*

[24] *Id.* at 7.

[25] Piquero, *supra* note 20.

[26] *See, e.g.*, Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 Stan. L. & Pol'y Rev. 293, 297 (2009); Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. 2015).

likely, to the detriment of policing violent crimes.[27] While this may include seizures of high value items such as family homes,[28] and automobiles, in some jurisdictions police are even seizing small amounts of cash during police encounters.[29]

Like fines, forfeitures can be financially devastating. Forfeiture practices often "target the poor and other groups least able to defend their interests in forfeiture proceedings."[30] A forfeiture may deprive people of cash they need for basic necessities, a vehicle used for transport to work or school, or even the roof over their and their family's heads.

III. Incorporation is necessary because states have strong financial incentives to raise revenue by levying excessive fines and forfeitures

Sovereigns are always thirsty for money, and fines and forfeitures are often an easy way to get this money. Fines and forfeitures are thus especially likely to be abused—which is why the forerunner of the Ex-

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[27] *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 314 (1998).

[28] *See, e.g.*, Pamela Brown, *Parent's House Seized After Son's Drug Bust*, CNN (Sept. 8, 2014).

[29] Robert O'Harrow Jr. & Steven Rich, *D.C. Police Plan for Future Seizure Proceeds Years in Advance in City Budget Documents*, Wash. Post (Nov. 15, 2014); ACLU, *Guilty Property: How Law Enforcement Takes $1 Million in Cash from Innocent Philadelphians Every Year—and Gets Away With It* (June 2015).

[30] *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

cessive Fines Clause in Anglo-American law dates back to Magna Carta.[31]

Today, the system of targeting the poor with fines and then imposing "poverty penalties" generates huge sums for states and localities, as do forfeitures. They operate as regressive taxes—where those with the least ability to pay end up paying the most.

And these practices are especially politically appealing because they reduce taxes for the wider population, while burdening those who are least likely to push back. The poor, who are most effected by excessive fines and forfeitures, are also among the least likely to vote.[32] They are less likely to acquire politi-

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[31] The Clause was taken almost verbatim from Virginia's excessive fines clause, which was borrowed from the English Bill of Rights, which in turn dates back to Magna Carta. *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 266-68 (1989). Before Magna Carta, the King often imposed excessive fines on his subjects or political enemies to raise revenue. But under Magna Carta, the King was specifically limited in using fines as a source of royal revenue or as a weapon against his enemies. *Id.* at 268-72. Furthermore, provisions in Magna Carta explicitly stated that defendants' lives and their ability to maintain a livelihood should not be ruined by fines, and prohibited fines that bankrupted defendants. Colgan, *supra* note 5, at 321.

[32] Daniel Weeks, *Why are the Poor and Minorities Less Likely to Vote?*, The Atlantic (Jan. 10, 2014), https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/ (citing U.S. census data showing that "47 percent of eligible adults with family incomes of less than $20,000 a year voted in 2012 and just one in four voted in the midterm election of 2010. By contrast, those with annual earnings of $100,000 or more turned out at rates of around 80 percent and 60 percent, respectively.")

cal power in other ways, such as through contributing to political campaigns. They are less likely to have friends in high places. And people with a criminal record may often be unable to regain their voting rights if they fail to pay their criminal debts. Laws in thirty-four states allow for continued disenfranchisement due to outstanding criminal debt regardless of whether the would-be voter has any meaningful ability to pay.[33]

Given this political reality, it is not surprising that fines and forfeitures are increasing: For example, Arizona originally imposed an extra 57% felony surcharge based on the combined total of other economic sanctions.[34] In 2012, that surcharge rose to 83%.[35] Similarly, in the past ten years the Department of Justice's asset forfeiture program has involved seizures of money and property totaling over $28 billion[36]—and this excludes forfeitures obtained through local or state proceedings.[37]

And just as state legislatures have an incentive to create laws that lead to excessive fines and forfeitures, state courts have an incentive not to police

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[33] Beth A. Colgan, *Wealth-Based Penal Disenfranchisement* (forthcoming).

[34] Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 23-24 (2016).

[35] *Id.*

[36] Office of the Inspector General, U.S. Dep't of Justice, Review of the Department's Oversight and Cash Forfeiture Activities (Mar. 2017).

[37] *See, e.g.*, Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 Ohio St. L.J. 1409, 1432 (2001).

them. Indeed, fines often fund the courts themselves.[38] Particularly in budget-strapped times, some governments become dependent on revenue from economic sanctions. One report noted that the "Nevada Supreme Court recently went broke because revenue from traffic tickets plummeted, and the city of San Jose, California, lamented the drop in traffic violation revenue."[39] An Oklahoma County District Judge was recently quoted as saying, "Today, we fund probably 90 percent or more of the operation of the courts actually out of the money that the court collects."[40]

Similarly, prosecutors and law enforcement often directly receive forfeiture funds,[41] and this often leads to distorted priorities. For example, earlier this year a bill was filed in Alabama's legislature that would require a conviction prior to forfeiture and that would place revenue from forfeitures in the state's general fund. In response, the presidents of the Alabama District Attorneys Association and Alabama Sheriffs Association publicly stated that, if the bill was passed, prosecutors would file criminal charges in nonviolent and drug-offense cases against people who they oth-

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[38] Matt Ford, *The Problem with Funding Government Through Fines*, The Atlantic (Apr. 2, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-problem-with-funding-government-through-fines/389387/.

[39] Martin, *supra* note 3, at 477 (citations omitted).

[40] Kate Carlton Greer, *Over the Years, Court Fines, Fees Have Replaced General Revenue Funds*, KGOU (Feb. 9, 2015), http://kgou.org/post/over-years-court-fines-fees-have-replaced-general-revenue-funds.

[41] *See* Rachel A. Harmon, *Federal Programs and the Real Cost of Policing*, 90 N.Y.U. L. Rev. 970, 954-55 (2015).

erwise would have believed better served by diversion programs, and law enforcement would stop policing drug and property crimes. Without receiving forfeiture funds, the groups reasoned, "[w]hat incentive would local police and sheriffs have to invest manpower, resources and time in these operations?"[42]

Recognizing the Excessive Fines Clause as limiting state and local action would not cure all these ills. It would only limit excessive fines and forfeitures, which this Court has defined as limited to those that are "gross[ly] disproportionat[e]." *Bajakajian*, 524 U.S. at 336-37. It would leave governments free to impose serious fines that are not excessive. Understandably, such fines and forfeitures may deliberately cause considerable economic pain, so as to deter and punish misconduct.

But incorporating the Clause would at least require state courts to police the outer boundaries of fines as a matter of federal right—and to recognize that state and local governments' growing appetite for raising money through fines must be subject to some constitutional constraint.

CONCLUSION

Anglo-American law has long recognized the wrongness of excessive fines and forfeitures, from 1215 to 1689 to 1791. That right is as important as the others that the Bill of Rights protects.

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[42] Brian McVeigh & Dave Sutton, Op-Ed., *Don't Gut Civil Asset Forfeiture*, AL.com (Feb. 12, 2018), http://www.al.com/opinion/index.ssf/2018/02/dont_gut_civil_asset_forfeitur.html.

Indeed, for the poor, the right is especially important, because excessive fines and forfeitures can impose harsh burdens on poor defendants, burdens that have effects lasting for years. And revenue from fines and forfeitures tempts governments to constantly increase them, and state courts to neglect scrutinizing them. This Court should grant certiorari and decide whether the Excessive Fines Clause should be enforced against state and local governments—as are the other clauses of the Eighth Amendment, and the great majority of the other parts of the Bill of Rights.

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In The Supreme Court of the United States

TYSON TIMBS and
A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Indiana Supreme Court

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INTEREST OF *AMICI CURIAE*[1]

The Southern Poverty Law Center ("SPLC") has provided pro bono civil rights representation to low-income persons in the Southeast since 1971, with particular focus on combating unlawful discrimination and ending poverty. The SPLC provides educational materials, engages in policy reform, and develops litigation to minimize the burdens placed on the poor, to ensure meaningful access to social safety nets, and to enable upward mobility.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999, and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The SPLC and the Cato Institute as *amici curiae* are concerned that local jurisdictions pursue civil and criminal fines, fees, and forfeitures at alarmingly high

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[1] All parties have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

rates. Faults in our criminal justice system demonstrate that the protections of the Eighth Amendment are urgently needed across America. The Indiana Supreme Court's failure to even analyze whether the Eighth Amendment's Excessive Fines Clause applies to the State of Indiana is deeply troubling, evidencing a dereliction of the court's duty to ensure the citizens of Indiana enjoy the protections granted them by federal law.

SUMMARY OF ARGUMENT

In the last three decades, there has been an unprecedented rise in fines, fees, and forfeitures imposed by state and federal criminal justice systems. The burgeoning emphasis on revenue generation to the exclusion of all else is transforming the landscape of the American criminal justice system – and not for the better. Unchecked fines, fees, and forfeitures increase poverty, crime, recidivism, and mass incarceration, ultimately costing the taxpayers and society much more than the revenue generated. Despite these societal costs, many law enforcement agencies and municipal entities see the benefit of revenues collected directly in their bottom line. This Court has recognized that when law enforcement can directly profit from revenues, constitutional safeguards must be at their zenith to protect against unconstitutional behavior. Yet the Indiana Supreme Court failed to even consider whether the Excessive Fines Clause provided such a safeguard for the citizens of Indiana. This Court should grant certiorari

to resolve the issue of incorporation of the Excessive Fines Clause and establish uniformity of judicial approach.

This brief proceeds in four parts. First, it details the unprecedented increase in civil and criminal fines, fees, and forfeitures in the last few decades. Second, this brief explains the distortion of criminal justice that results from such governmental self-dealing. Allowing unchecked fines, fees, and forfeitures undermines governmental aims of reducing poverty, crime, and mass incarceration. Third, this brief looks at how local governments' pursuit of fines, fees, and forfeitures distorts law enforcement priorities and incentivizes unconstitutional behavior by law enforcement and governmental entities. Lastly, this brief explains how the approach in the decision below abjectly failed to secure constitutional rights, causing great harm to the criminal justice system.

ARGUMENT

I. IN RECENT YEARS, AMERICAN CITIZENS HAVE FACED AN UNPRECEDENTED INCREASE IN CRIMINAL FINES, FEES, AND FORFEITURES.

In the United States today, 10 million people hold criminal debt amounting to over $50 billion.[2] In the

[2] Katherine D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They*

last three decades, there has been an unprecedented rise in fines, fees, and forfeitures imposed by state and federal criminal justice systems. This proliferation of criminal debt takes a number of forms, including fines and fees imposed at all stages of criminal proceedings, payment of restitution to victims,[3] and the use of "civil forfeitures," where the government seizes property even without a criminal conviction.[4] Just *federal* civil forfeitures have increased 4,667% between 1986 and 2014.[5] That enormous percentage is not a typographical error.

The number of individuals in the criminal justice system also has increased dramatically over the past few decades. "Between 1983 and 2001, incarceration (jail and prison) in the United States increased from 275 inmates per 100,000 to 686 inmates per 100,000. . . ."[6] The number of individuals on parole also swelled dramatically, jumping from 1.84 million people in 1980 to 6.47 million in 2000.[7]

Create, HARVARD KENNEDY SCHOOL & NAT'L INST. OF JUSTICE 3 (Jan. 2017).

[3] *Id.* at 4.

[4] Civil forfeiture is distinct from criminal forfeiture, which is imposed as part of criminal sentencing, *see Alexander v. United States*, 509 U.S. 544, 548 (1993), and also from forfeitures agreed to by a defendant as a part of a plea deal, *see, e.g.*, *Austin v. United States*, 509 U.S. 602, 604-05 (1993).

[5] Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 5 (2d ed. 2015).

[6] Martin, *supra*, at 3.

[7] Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* 133 (Duke Univ. Press 2009).

To obscure the cost of this burgeoning prison population, jurisdictions impose fines, fees, and forfeitures as a way to raise funds without visibly raising taxes. Studies show state criminal justice budgets (combined) increased from roughly $35 billion to $130 billion per year between 1982 and 1997.[8] To help pay for the dramatic growth of incarcerated and paroled individuals, and the judicial systems that charge such individuals, local governments impose fines at every step of criminal proceedings. For example, in Ferguson, Missouri, fines, fees, and forfeitures constituted more than 20% of the city's 2013 general revenue fund.[9]

Since 2010, 48 states have increased civil and criminal fees.[10] One report indicated that in 1991, 25% of prison inmates were assessed fines, but by 2004, that figure had risen to 66%.[11] The vast majority of incarcerated persons rack up tremendous debt due to fees imposed while they are in prison. In 2005, studies showed that 90% of those behind bars were charged fees for programs and services such as medical care, work release programs, and telephone use.[12] Eighty-five

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[8] *Id.* at 157.

[9] United States Dep't of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* 9 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf ("Ferguson Report").

[10] Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NATIONAL PUBLIC RADIO (May 21, 2014).

[11] Alexes Harris, et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in Contemporary United States*, 115 AM. J. SOCIOLOGY 1753, 1785-86 (2010).

[12] Martin, *supra*, at 5.

percent of people on probation and parole are also required to pay supervision fees, fines, and restitution if they want to remain free.[13] A recent study shows that families of the formerly incarcerated incur, on average, $13,607 for court-related fines and fees.[14] For the vast majority of formerly incarcerated persons who are low-income, this burden is impossible to overcome.

II. UNCHECKED FINES, FEES, AND FORFEITURES PERVERT CRIMINAL JUSTICE AIMS AND LEAD TO INCREASED SOCIETAL COSTS DUE TO INCREASES IN POVERTY, CRIME, AND MASS INCARCERATION.

Unchecked fines, fees, and forfeitures pervert the goals of criminal justice. First, this myopic focus on revenue generation causes law enforcement to "fail to consider, or even implement policies that directly conflict with, public-safety needs."[15] The Department of Justice's Ferguson Report profiles a poignant example of what happens when law enforcement becomes focused on revenue at the expense of public safety. That study demonstrated that focus on revenue generation resulted in unconstitutional and racially motivated behavior by law enforcement and municipal employees,

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[13] *Id.*

[14] Saneta deVuono-powell, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, Forward Together, Research Action Design 9 (Sept. 2015).

[15] Beth A. Colgan, "Fines, Fees, and Forfeitures" in Reforming Criminal Justice – Volume 4: Punishment, Incarceration, and Release 209 (Erik Luna ed. 2017) ("Colgan").

financial hardship for Ferguson's most vulnerable populations, and an erosion of public trust in municipal institutions and leadership.[16] Another study showed that allowing police to retain forfeited property "increased arrests related to drug activity compared to total arrests by nearly 20%."[17]

Second, the trend towards rising fines, fees, and forfeitures especially harms vulnerable populations who are living at or below the poverty line, and may actually *increase* poverty, crime, and mass incarceration. "By entrenching or exacerbating the financial vulnerability of people and their families, fines, fees, and forfeitures can create long-term instability and familial disruption, increase criminal justice involvement, aggravate jail overcrowding, and – perhaps ironically – decrease net revenue."[18]

For those without the ability to pay, fees and fines mean that even the most casual encounter with the criminal justice system can have catastrophic results. Those facing criminal debt must often choose between paying their debts and providing for basic needs like food and shelter.[19] Studies have linked increased fines to inability to pay child support or secure public housing, resulting in increased difficulties for low-inco[illegible]

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[16] *See generally* Ferguson Report.

[17] Colgan, *supra*, at 211.

[18] *Id.*

[19] Katherine Beckett & Alex Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 J. CRIMINOLOGY & PUB. POL'Y 509, 517 (2011).

families.[20] Criminal debt may also damage a debtor's credit rating, prevent a debtor from expunging criminal records, or cost a debtor professional or driver's licenses.[21] According to one study, 80% of those interviewed found their criminal debt obligations to be "unduly burdensome."[22]

The burgeoning business of fines, fees, and forfeitures also undermines rehabilitation by increasing recidivism. Unsurprisingly, people with unmanageable criminal debt are pressured into committing further crimes just to manage this burden.[23] Criminal debt can prevent access to public-sector employment and government-related private occupations,[24] and also prompt "additional warrants, liens, wage garnishments and tax rebate interception."[25] Again, unsurprisingly, the inability to secure stable housing or employment also makes re-offense more likely.

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[20] Rachel L. McLean & Michael D. Thompson, Council of State Gov't Justice Ctr., *Repaying Debts* 7-8 (2007).

[21] Colgan, *supra*, at 212.

[22] Harris, *supra*, at 1785-86.

[23] *Id.*; Faith E. Lutze et al., *Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State's Reentry Housing Program for High Risk Offenders*, 41 Crim. Just. & Behav. 471 (2013).

[24] Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford Univ. Press 2006).

[25] Martin, *supra*, at 9.

Incarceration for inability to pay fines is unconstitutional under *Bearden v. Georgia*,[26] but it remains a common practice. In many states, debtors account for a quarter of jail populations.[27] Further incarceration can follow failure to pay criminal debt in a number of ways – those on probation may have probation revoked; criminal or civil offenses may result in incarceration for willful failure to pay; debtors may sometimes pay off debts by serving time in jail; and individuals may be arrested and jailed for missing a payment or not appearing at a hearing.[28] Or, as noted above, they may simply be denied employment and turn to crime to satisfy outstanding fines.

Debtors' prisons are no more effective or just now than they were in Dickensian England. Putting individuals in prison for inability to pay criminal debt is impractical and expensive, and disproportionately impacts low-income communities. The reality is that only a sliver of this nation's criminal debt is collected: for instance, of the $100 billion owed to the federal government in criminal debt, only about $4 billion per year is collected.[29] The proliferation of criminal debt is hurting society at large and costing the system much more than the revenue generated.

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[26] 461 U.S. 660, 661-62 (1983).

[27] Ferguson Report, n.12.

[28] Martin, *supra*, at 10.

[29] *Id.* at 5.

III. UNCHECKED FINES, FEES, AND FORFEITURES DISTORT LAW ENFORCEMENT PRIORITIES AND INCENTIVIZE UNCONSTITUTIONAL BEHAVIOR.

When law enforcement is driven primarily by revenue generation, policing practices will naturally give less attention to either promoting public safety or respecting constitutional rights. For example, unchecked civil forfeiture means that drug activity receives disproportionate attention relative to plausible public safety concerns – simply because that is where the cash is.[30] Likewise, ticketing revenue demonstrably upticks when city revenues decline.[31]

The scope of civil forfeiture untied to any criminal action is simply astounding. *The Washington Post* in 2014 reported that local law enforcement agencies participating in the Justice Department's Equitable Sharing Program retain up to 80% of seized assets.[32] Of

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[30] Colgan, *supra*, at 210-11. *See also* Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 284 (2000); John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171 (2001).

[31] Colgan, *supra*, at 209-10. *See also* Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71 (2009); Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool for Systemic Reform*, 58 WM. & MARY L. REV. 1179 Part I.A. (2017).

[32] *See* Robert O'Hara, Jr. & Steven Rich, *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014), http://www.washingtonpost.

nearly $2.5 billion self-reported monies collected and spent under the program, the *Post* calculated that 81% "came from cash and property seizures in which no indictment was filed."[33] The local law enforcement agencies used these funds for their own purposes without accountability to local budgeting procedures. For example, out of the nearly $3.4 million spent by the Oklahoma Highway Patrol under this program from July 2009 to June 2012, $1.9 million constituted unallowable and unsupported expenditures relating to salaries, overtime pay, construction, contractor fees, and the use of two Ford F-150 pickup trucks by non-law enforcement personnel.[34]

The Ferguson Report presents an especially disturbing case study of a criminal justice system distorted by an unchecked focus on revenue production. The Justice Department found that "[t]he City's emphasis on revenue generation has a profound effect on [the Ferguson Police Department's] approach to law enforcement" and produces "aggressive enforcement of Ferguson's municipal code, with insufficient thought given to whether enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation."[35]

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com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/?utm_term=.f5abfdc53077.

[33] *Id.*

[34] *Id.*

[35] Ferguson Report at 2.

Specifically, the report detailed the City's long-standing objective to increase "productivity" from municipal fines, to evaluate police officers based on their volume of traffic citations, to implement higher fines for high volume offenses, and to prioritize revenue generation in its justice system.[36] For example, the City prided itself for fining citizens up to $105 for "Weed/Tall Grass" violations of its code, when other municipalities charge only $5.[37] Police officers competed to see how many citations (i.e., fines) they could generate from one stop.[38] Bond forfeiture practices imposed undue hardships on individuals, including prolonged detentions and forfeitures, without any reduction of the outstanding fine.[39] The report concludes that all of these practices disproportionately impacted African Americans.

Despite the indignity this system wreaked on citizens, the City repeatedly disregarded concerns "about the impact its focus on revenue has had on lawful police action and the fair administration of justice in Ferguson."[40] The court's ability to optimize revenue generation had been the City's paramount concern. The report concluded by demonstrating in shameful detail how the unchecked focus on revenue generation

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[36] *Id.* at 9-14.

[37] *Id.* at 10.

[38] *Id.* at 11, 66.

[39] Ferguson Report at 58-62.

[40] *Id.* at 14.

resulted in chronic violations of individuals' rights under the First, Fourth, and Fourteenth Amendments.[41]

This Court has the opportunity to grant certiorari and offer guidance regarding the Excessive Fines Clause to ameliorate such perversions of local criminal justice systems. In many related contexts, this Court has recognized that the government's pecuniary interests can result in constitutional violations. In *Connally v. Georgia*, this Court struck down a warrant procedure where the justice of the peace received remuneration for every warrant issued.[42] In *Connally*, the Court relied on *Tumey v. Ohio*, in which the Court struck down a municipal fine system under which the village mayor had authority to impose fines and the village received a share of those fines.[43] In *Ward v. Village of Monroeville*, the Court invalidated a procedure by which sums produced by a mayor's court constituted a significant portion of municipal revenue.[44]

Similarly, in *Marshall v. Jericho*, a case challenging the return of certain civil fines to the Employment Standards Administration, the Court recognized that financial rewards can impugn prosecutorial discretion.[45] In *Bearden v. Georgia*, the Court considered whether

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[41] *Id.* at 15-78.

[42] 429 U.S. 245, 251 (1977).

[43] 273 U.S. 510, 532 (1927).

[44] 409 U.S. 57, 60 (1972) (explaining the situation offered a possible temptation to the average man "which might lead him not to hold the balance nice, clear and true between the State and the accused").

[45] 446 U.S. 238, 249-50 (1980).

probation may be revoked for failure to pay fines, and held that the Fourteenth Amendment prohibits revocation in cases where an inmate's failure to pay was not willful, but resulted from inability to pay.[46] In these cases, this Court rejected systems corrupted by the influence of pecuniary interests held by the judicial actors.

These previously articulated concerns support granting certiorari. Recent illustrations such as the *Ferguson Report* and findings by *The Washington Post* demonstrate that the concerns underpinning this jurisprudence have only increased. The Court's role in identifying and eliminating perverse incentives of government is sacrosanct and needed now more than ever.

IV. THE COURT SHOULD GRANT CERTIORARI TO PROVIDE A NECESSARY AND UNIFORM CONSTITUTIONAL SAFEGUARD AGAINST EXCESSIVE FINES.

In light of the threat that unchecked fines, fees, and forfeitures pose to American criminal justice, the application of the Excessive Fines Clause to the states is a pressing issue. Some state courts appear emboldened to use the absence of a decision from this Court to ignore the constitutional right against excessive fines and deny citizens an answer whether the Eighth Amendment protects them.

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[46] 461 U.S. 660, 672-73 (1983).

This Court should also grant review to clarify that state courts may not "opt" to refuse to evaluate the merits of a properly raised federal constitutional defense, and to decide on the merits whether the Eighth Amendment restricts a state court's ability to levy excessive fines. Mr. Timbs properly invoked the Excessive Fines Clause through the Fourteenth Amendment's Due Process Clause. Indiana's highest court declared it would not determine whether Mr. Timbs had such a right. The court "opted" not to decide.[47] The court articulated a desire to concern itself with rights arising under Indiana's laws.[48] This judicial punt is antithetical to a citizen's established right to assert a federal constitutional protection in state court.

Barring waiver or other like circumstances, any citizen who raises in a state court a federal constitutional right is entitled to a merits decision whether the right protects the citizen. "Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state

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[47] Petitioners' App. at 8 (Opinion of the Supreme Court of the State of Indiana (Nov. 2, 2017)).

[48] *Id.* at 9 ("Indiana is a sovereign state within our federal system, and we elect not to impose federal obligations on the State that the federal government itself has not mandated. . . . [W]e decline to subject Indiana to a federal test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution.").

legislature."[49] Thus, as the Court stated in *Howlett v. Rose*, "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.' "[50]

The absence of definitive law compels not abdication of judicial scrutiny, but its exercise. A state court ought not to rely on an absence of definitive authority from this Court or lower federal courts to reject a constitutional right. This Court cannot possibly hope to issue definitive decisions on every constitutional issue brought to state courts. The absence of a definitive decision compels that state courts such as Indiana examine the right on its merits according to the principles set forth by this Court in *Howlett*.

Precisely because this Court has not decided the issue of incorporation, the Indiana Supreme Court should have. When it refused to entertain Mr. Timbs's constitutional defense, the Indiana Supreme Court cited no authority permitting its abdication of its responsibility to apply federal law. Rather, its stated rationale to review only state law is invalid according to long-standing precedent such as *Howlett* and *Miles v. Illinois C.R. Co.* ("[T]he Federal Constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and

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[49] *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

[50] *Id.* at 370 (citing *Douglas v. New York, N. H. & H. R. Co.*, 279 U.S. 377, 387-88 (1929) (Holmes, J.)).

enforceable wherever jurisdiction is adequate for the purpose.").[51]

Similarly, in *McKnett v. St. Louis & S. F. R. Co.*, this Court held that a state court may not discriminate against rights arising under federal law.[52] In *McKnett*, the Alabama court had denied jurisdiction over a claim "based solely upon the [federal] source of law sought to be enforced."[53] This Court reversed the state court, stating that a plaintiff may not be "cast out because he is suing to enforce a federal act."[54] Similarly, Mr. Timbs's defense predicated on the Constitution may not be cast out because he raised it in state court. The approach of the Indiana Supreme Court represents a dereliction of judicial duty and contradicts the well-established reach of the Constitution.

As in Indiana, Montana's highest court has offered no justification for dismissing out of hand an assertion of rights under the Eighth Amendment's Excessive Fines Clause. In Montana, a defendant subject to forfeiture of his vehicle asserted the Eighth Amendment.[55] The Montana Supreme Court chastised the defendant for not asserting the Montana Constitution, and stated without any analysis that it "declined" to hold that the Eighth Amendment "is applicable in

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[51] 315 U.S. 698, 704 (1942).

[52] 292 U.S. 230 (1934).

[53] *Id.* at 234.

[54] *Id.*

[55] *State v. Forfeiture of 2003 Chevrolet Pickup*, 202 P.3d 782, 783 (Mont. 2009).

Montana, when the federal courts have not done so."[56] On this latter point, the Montana Supreme Court was wrong. Two federal circuits prior to 2009 had held that the Eighth Amendment applied to the states.[57] But regardless, in the absence of binding precedent to the contrary, state courts have an independent duty to interpret and enforce the Constitution.

Michigan's lower appellate courts have also ignored assertions of the Eighth Amendment, while analyzing the state equivalent using federal principles. In 1996, the Michigan Court of Appeals noted that the U.S. Supreme Court had never decided whether the Excessive Fines Clause of the Eighth Amendment applies to the states.[58] That court proceeded to analyze whether the fine was excessive under the state constitution, relying on federal case law to do so.[59] Subsequently, Michigan's appellate courts have followed this approach, deferring on the Excessive Fines Clause of the Eighth Amendment without valid excuse, but

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[56] *Id.*

[57] *See Qwest Corp. v. Minnesota Public Utilities Commission*, 427 F.3d 1061, 1069 (8th Cir. 2005) (Excessive Fines Clause applies to states); *Wright v. Riveland*, 219 F.3d 905, 914 (9th Cir. 2000) (same); *see also Broussard v. Par. of Orleans*, 318 F.3d 644, 652 (5th Cir. 2003) (assuming Excessive Fines Clause applies to states).

[58] *In re Forfeiture of $25,505*, 560 N.W.2d 341, 347 (Mich. Ct. App. 1996).

[59] *Id.*

employing the state equivalent and acknowledging its similarity to the federal protection.[60]

This Court has rejected as a valid excuse "[t]he fact that a state court derives its existence and functions from the state laws."[61] This Court held in *Second Employers' Liability Cases*, that such an excuse "is no reason why [a state court] should not afford relief" under federal law, reasoning that the state court "is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State. . . ."[62]

This Court has thus rejected as a legitimate rationale that a state may confine its review to state law issues because the state funds the court system. "An excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal

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[60] *See In re Forfeiture of 5118 Indian Garden Rd.*, 654 N.W.2d 646, 648-49 (Mich. Ct. App. 2002) ("These factors dovetail, to a certain extent, with the United States Supreme Court's statement in *United States v. Bajakajian*, 524 U.S. 321, 337 (1998). . . ."); *People v. Antolovich*, 525 N.W.2d 513, 515 (Mich. App. 1994) (declining to determine whether the fine violated the Eighth Amendment of the United States Constitution, but invalidating the fine as excessive under the state constitution).

[61] *Second Employers' Liability Cases*, 223 U.S. 1, 58 (1912).

[62] *Id.* at 58.

to recognize the superior authority of its source."[63] This case presents an infrequent yet serious rebellion against the jurisprudential system this Court recognized in *Second Employers' Liability Cases*. This Court should take review to enforce the holdings and rationales of *Second Employers' Liability Cases* and *Howlett*.

In "selective incorporation" and due process cases, this Court ordinarily reviews a lower court decision that undertook a legal analysis whether the asserted constitutional right applies.[64] Here, this Court has no analysis to review because the Indiana Supreme Court

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[63] *Howlett*, 496 U.S. at 371.

[64] *See, e.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963), *rev'g State v. Edwards*, 123 S.E.2d 247 (S.C. 1961) (holding that the breach of the peace was punishable and outside the scope of the defendants' assertion of constitutional rights under the Federal Constitution); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), *rev'g State v. Cantwell*, 8 A.2d 533 (Conn. 1939) (evaluating the challenged statute on the merits under the Establishment Clause asserted through the Fourteenth Amendment); *Palko v. Connecticut*, 302 U.S. 319, 329 (1937), *aff'g State v. Palko*, 191 A. 320 (Conn. 1937) ("As the claim of the accused raises questions as to rights secured under the provisions of the Constitution of the United States, we look to the decisions of the Supreme Court of the United States for guidance as to the proper construction of these provisions."), *rev'd on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937), *rev'g State v. De Jonge*, 51 P.2d 674 (Or. 1935) (performing a legal analysis regarding the federal right to assembly and distinguishing prior federal authorities to hold the statute constitutional); *Gitlow v. New York*, 268 U.S. 652, 666 (1925), *aff'g People v. Gitlow*, 195 A.D. 773 (N.Y. App. Div. 1921) (addressing on the merits application of freedom of speech and of the press guaranteed by the First Amendment under the Fourteenth Amendment to the challenged state statute).

refused to conduct one. In addition to the glaring error of leaving a properly raised constitutional right unresolved, this approach undermines the Court's review function, improperly forcing onto this Court a burden to grant certiorari or leave unaddressed a citizen's properly asserted constitutional defense.

No justification supports the state court's abdication of its responsibility to administer the laws not just of Indiana, but of the United States. This Court should grant certiorari in order to consider and reject the dismissive, unconstitutional methodology of the Indiana high court.

CONCLUSION

The Court should grant certiorari to resolve the issue of incorporation of the Excessive Fines Clause of the Eighth Amendment and establish uniformity of judicial approach. As discussed in detail above, the imposition of fees, fines, and forfeitures has risen dramatically in recent years, leading states across the country to permit aggressive policing practices of dubious constitutionality.

The Court has remarked that new criminal justice cases will assist the judiciary to expose "old infirmities which apathy or absence of challenge has permitted to stand."[66] The petition for certiorari offers this Court an opportunity to do just that by addressing infirmities

[66] *Williams v. Illinois*, 399 U.S. 235, 245 (1970).

with which this Court has yet to reckon. Guidance from this Court will improve the functioning of both state and federal courts and resolve an issue of tremendous significance to the criminal justice system.

The petition should be granted.

Respectfully submitted,

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Dated: March 5, 2018

No. 17-1091

In The
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ Of Certiorari To The Indiana Supreme Court

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners are Tyson Timbs and his 2012 Land Rover LR2. Respondent is the State of Indiana. Additional plaintiffs before the state trial court were the J.E.A.N. Team Drug Task Force, the Marion Police Department, and the Grant County Sheriff's Department.

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INTRODUCTION

Five Terms ago, this Court observed—correctly—that the Excessive Fines Clause applies to the States: "The Eighth Amendment provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,'" and "[t]he Fourteenth Amendment applies those restrictions to the States." *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014). The Court made a similar observation in 2001—that "the Fourteenth Amendment . . . makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus.* v. *Leatherman Tool Grp.*, 532 U.S. 424, 433–34 (2001). And on several other occasions over the last 30 years, the Court has made statements to the same effect.[1]

Perhaps because those cases did not involve fines, the Indiana Supreme Court "decline[d]" to treat the Excessive Fines Clause as incorporated against the States. Pet. App. 9. But the Clause easily meets the standard for incorporation. Freedom from excessive fines is both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and

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[1] *See Kennedy* v. *Louisiana*, 554 U.S. 407, 412, 419 (2008); *Roper* v. *Simmons*, 543 U.S. 551, 560 (2005); *Booth* v. *Maryland*, 482 U.S. 496, 501 n.5 (1987), *overruled on other grounds*, *Payne* v. *Tennessee*, 501 U.S. 808 (1991); *see also Baze* v. *Rees*, 553 U.S. 35, 47 (2008) (plurality opinion); *Harmelin* v. *Michigan*, 501 U.S. 957, 962 (1991) (opinion of Scalia, J.); *Thompson* v. *Oklahoma*, 487 U.S. 815, 819 n.1 (1988) (plurality opinion).

tradition." *McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010) (emphasis and quotation marks omitted).

Whether the question presented is viewed through the Due Process Clause or the Privileges or Immunities Clause, the right to be free from excessive fines is fundamental and applies to the States. The power to fine is—and has always been—a formidable one. And unlike every other form of punishment, fines and forfeitures are a source of revenue for the government, making them uniquely prone to abuse. The accompanying risk to life, liberty, and property is very real. "[I]n a free government," after all, "almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1784, 661 (1833). The Court should thus adhere to its statements in *Hall*, *Cooper Industries*, and other decisions and hold that the Excessive Fines Clause applies to the States under the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported at 84 N.E.3d 1179. *See* Appendix to Petition for a Writ of Certiorari (Pet. App.) 1–12. The opinion of the Indiana Court of Appeals is reported at 62 N.E.3d 472. *See* Pet. App. 13–26. The opinions of the Grant County Superior Court are unpublished, but are reproduced at Pet. App. 27–34.

JURISDICTION

The Indiana Supreme Court entered judgment on November 2, 2017. The petition for a writ of certiorari was filed on January 31, 2018. This Court granted the petition on June 18, 2018. This Court has jurisdiction because the "highest court of a State" disposed of the case based on a "right, privilege, or immunity . . . claimed under the Constitution." 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. After his father died, Tyson Timbs (Petitioner) received around $73,000 in life-insurance proceeds. Hrg. Tr. 38:12–38:21 (July 15, 2015). He used roughly $42,000 of that money to buy the SUV at issue in this case. Pet. App. 2.

At the time, Petitioner had recently moved to Marion, Indiana, to help his aunt and try to rebuild his life. Timbs C.A. App. vol. 2, p. 26 (sealed presentence report). Before that, Petitioner lived in St. Mary's, Ohio, where he became addicted to hydrocodone, an opioid medication prescribed to him to alleviate persistent foot pain. *Id.* When his prescription ran out, he began buying pills from drug dealers. *Id.* When his dealer had no pills one day, he turned to heroin as a substitute. *Id.*

For a short time after moving to Marion, Petitioner overcame his addiction. *Id.* But he relapsed around the time his father died. *See id.* 26–27. His money soon ran out. And while Petitioner was looking for new ways to fund his addiction, a confidential informant connected him with heroin buyers, who turned out to be undercover police officers. Pet. App. 14. Over the coming weeks, Petitioner engaged in two drug transactions with the officers. Pet. App. 14–15. The first time, he drove to meet the officers and sold them two grams of heroin for $225. Hrg. Tr. 26:25–27:02, 37:03–37:12 (July 15, 2015). A few days later, he walked to a nearby gas station, where he sold them another two grams, for $160. Hrg. Tr. 29:06–29:20 (July 15, 2015). En route to a third transaction, officers pulled Petitioner over and

arrested him. Pet. App. 15. They seized his vehicle on the spot. State C.A. App. p. 10.

The State of Indiana charged Petitioner with two counts of dealing in a controlled substance and one count of conspiracy to commit theft. Pet. App. 15.[2] Two years later, he pleaded guilty to one of the two counts of dealing and to the count of conspiracy to commit theft. Pet. App. 15. The trial court sentenced him to six years—one year on home detention (with his aunt) and the remaining five years on probation, including a court-supervised addiction-treatment program. Pet. App. 15; Timbs C.A. App. vol. 1, pp. 19–20. The court also assessed Petitioner investigation costs ($385), an interdiction fee ($200), court costs ($168), a bond fee ($50), and $400 for drug-and-alcohol assessment through the probation department. *See* Pet. App. 15.

2. While Petitioner's criminal case was pending, a private law firm filed a civil case to forfeit his vehicle on behalf of the State. *See* State C.A. App. pp. 10–11. The complaint "referred only to May 31, 2013"—the date on which Petitioner was arrested—and alleged the vehicle "had been . . . used to facilitate any violation of a criminal statute." Pet. App. 21, 22 n.2.

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[2] In a post-arrest interview, detectives asked why Petitioner and his companion had no heroin in the vehicle at the time of his arrest, since undercover officers expected to buy heroin. Petitioner told them, "we thought about maybe just pulling up and, if he would've gave me the money, just driving away . . . I'm not really sure what we were going to do." State's Trial Ex. 1 at 19:23–20:00, 21:03–21:25; *see also* Hrg. Tr. 16:11–18:10 (July 15, 2015). These statements appear to have been the basis for the theft charge.

Following Petitioner's guilty plea, the trial court held an evidentiary hearing in the civil-forfeiture case. The court found that Petitioner purchased the vehicle legally, using his father's life-insurance proceeds, but later used it to "transport . . . heroin back to Marion." Pet. App. 28 ¶¶ 2–3. Based on the record, the court determined that forfeiture would be "grossly disproportional to the gravity of [Petitioner's] offense" and thus unconstitutional under the Eighth Amendment's Excessive Fines Clause. Pet. App. 29–30 ¶¶ 6–9; *see generally Hudson* v. *United States*, 522 U.S. 93, 103 (1997) ("The Eighth Amendment protects against excessive civil fines, including forfeitures." (citing *Austin* v. *United States*, 509 U.S. 602, 622 (1993)). "While the negative impact on our society of trafficking in illegal drugs is substantial," the court acknowledged, "a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to [Petitioner's] illegal conduct." Pet. App. 30 ¶ 9.

3. A divided panel of the Indiana Court of Appeals affirmed. Pet. App. 13–26. The court concluded that "[t]he United States Supreme Court has yet to hold that the Excessive Fines Clause is applicable to the States." Pet. App. 17–18 n.4. Based on its own precedent, however, the court held that the Clause applies in Indiana. Pet. App. 18 n.4.

The court then affirmed that forfeiting Petitioner's vehicle would be unconstitutional. The court compared the value of the vehicle (around $42,000) to the maximum criminal fine for Petitioner's drug offense

($10,000). Pet. App. 14, 20–21.[3] The court noted the "financial burdens" that "had already been imposed on [Petitioner] when he pleaded guilty." Pet. App. 21. And the court concluded that the State's forfeiture complaint appeared to allege a single predicate offense—the unconsummated third transaction. Pet. App. 21. Even considering the record as a whole, the court observed that "the only evidence before the trial court was that [Petitioner] sold heroin twice, both times as a result of controlled buys." Pet. App. 22. Based on these facts, the court affirmed that "[f]orfeiture of the Land Rover . . . was grossly disproportionate to the gravity of [Petitioner's] offense." Pet. App. 24.

4. The Indiana Supreme Court granted review and reversed. Pet. App. 1–12. Surveying decisions that have addressed incorporation, Pet. App. 5–7, the court concluded that "[t]he Supreme Court has never held that States are subject to the Excessive Fines Clause," Pet. App. 5. "Given the lack of clear direction from the Supreme Court," the court "decline[d] to find or assume incorporation." Pet. App. 8. Citing Indiana's status as "a sovereign state within our federal system," the court held that it would not "impose federal obligations on the State that the federal government itself has not mandated." Pet. App. 9.

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[3] Indiana authorizes a maximum $10,000 fine for every class of felony. *See* Ind. Code §§ 35-50-2-4 to -7.

SUMMARY OF ARGUMENT

Whether viewed through the Fourteenth Amendment's Due Process Clause or its Privileges or Immunities Clause, the Excessive Fines Clause applies to the States.

First, the Due Process Clause incorporates the right to be free from excessive fines because it is among those rights that are "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010) (emphasis and internal quotation marks omitted). When the Eighth Amendment was ratified, in 1791, protections against excessive fines were already fundamental and deeply rooted in the Anglo-American legal tradition. When the Fourteenth Amendment was ratified, in 1868, the right continued to rank among Americans' most basic liberties. That remains equally true today.

Applying the Excessive Fines Clause to the States is also consistent with this Court's Eighth Amendment precedent. Like the protections against "cruel and unusual punishments" and "excessive bail"—which have long been understood to apply to the States—the Excessive Fines Clause "prevent[s] the government from abusing its power to punish." *Austin* v. *United States*, 509 U.S. 602, 607 (1993) (emphasis omitted). Put differently, the Amendment's three Clauses embody "parallel limitations" on the government's punitive power. *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989) (quoting *Ingraham* v. *Wright*,

430 U.S. 651, 664 (1977)). There is thus "no reason to distinguish one Clause of the Eighth Amendment from another for purposes of incorporation." *Id.* at 284 (O'Connor, J., concurring in part and dissenting in part). Like the Eighth Amendment's two other Clauses, the Excessive Fines Clause applies to the federal government and the States alike.

Second, the Privileges or Immunities Clause provides an alternative path for holding that the Excessive Fines Clause applies to the States. Like other rights secured in the first eight Amendments, the right to be free from excessive fines is one of the "privileges or immunities of citizens of the United States," which no State may abridge. For this reason, too, the Excessive Fines Clause is applicable to the States.

ARGUMENT

I. The Excessive Fines Clause applies to the States under the Fourteenth Amendment's Due Process Clause.

The Excessive Fines Clause applies to the States because it is "incorporated in the concept of due process." *See McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010). This Court long ago "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause." *Id.* at 764. And under the "well established" standard set forth in *McDonald*, *id.* at 750, the Excessive Fines Clause merits incorporation. The right to be

free from excessive fines was deeply rooted at the time of the framing. It was deeply rooted at the time of the Fourteenth Amendment's ratification. It remains deeply rooted today. *Cf. id.* at 917 (Breyer, J., dissenting) (inquiring whether right "has remained fundamental over time"). The only approach consistent with this Court's Eighth Amendment precedent is to apply the Excessive Fines Clause to the States.

A. When the Eighth Amendment was ratified, the right to be free from excessive fines was already deeply rooted in the Anglo-American legal tradition.

The right to be free from excessive fines is fundamental and "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767 (citation omitted). The Amendment's language was lifted almost verbatim from the Virginia Declaration of Rights, which borrowed in turn from the 1689 English Bill of Rights, which declared: "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689), *quoted in Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 266–67 (1989). Blackstone traced the protection against excessive fines back further still, to Magna Carta, and before that to the reign of Henry II. 4 William Blackstone, Commentaries *372; *see also Browning-Ferris Indus.*, 492 U.S. at 270 n.14; *cf. McDonald*, 561 U.S. at 768 (looking to Blackstone and the English

Bill of Rights to determine that the Second Amendment is incorporated). Throughout these periods, the right to be free from excessive fines has been closely linked to securing life, liberty, and property.

1. Concerns about the abuse of the sovereign power to fine date back at least to Norman times. "So intimate is the connexion of judicature with finance under the Norman kings," wrote one nineteenth-century scholar, "that it was mainly for the sake of the profits that justice was administered at all." 1 William Stubbs, *The Constitutional History of England* § 127, 438 (1880). Magna Carta imposed an early check on the king's power to fine, providing that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement." Magna Carta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 5 (1769), *confirmed*, 25 Edw. I, ch. 1 (1297), 1 Stat. at Large 131–32, *quoted in Browning-Ferris Indus.*, 492 U.S. at 270 n.14. Sixty years later, Parliament prohibited excessive fines by statute, providing that no man might "be amerced, without reasonable cause, and according to the quantity of his Trespass." The Statutes of Westminster, 3 Edw. I, ch. 6 (1275), in 1 Statutes of the Realm 28 (reprint 1963).

2. Four centuries later, in the 1600s, abuses by the Stuart kings led Parliament to enact even more concrete protections against excessive fines. *See Browning-Ferris Indus.*, 492 U.S. at 268 (looking to the "more recent history" of seventeenth-century England).

a. During Charles I's reign, fines served to raise revenue, target dissenters, and disrupt the balance of power between Parliament and the crown. Ordinarily, Parliament's power over the purse meant the monarch had to call Parliamentary sessions with some regularity. (With minor exceptions, Parliament alone had the power to tax.) Charles, however, dissolved Parliament for over a decade, resorting instead to abusive fines to keep his treasury afloat. Because "[n]ew resources of revenue . . . had now to be discovered," offenses "were sedulously sought for among the clauses of obsolete statutes, to discover pretexts under which money might be extorted." 1 *The Fairfax Correspondence: Memoirs of the Reign of Charles the First* 212 (George W. Johnson ed., 1848) (*Fairfax Correspondence*). For example, the king resurrected a "fine imposed upon all owning land worth forty pounds a year, who had neglected to be knighted." Godfrey Davies, *The Early Stuarts: 1603–1660*, at 83 (2d ed. 1959). In this way, he "mulct[ed] . . . the less wealthy classes of the community," and "very many were put to grievous fines and other vexations." *Fairfax Correspondence* 213. "Another mode of extracting money was to grant licenses to build houses, and then pretend that the houses were built contrary to proclamation, and extort heavy fines." 1 Andrew Bisset, *The History of the Struggle for Parliamentary Government in England* 107–08 (1877).

To target "those of higher pretensions and more ample means," the king revived other "obsolete laws." *Fairfax Correspondence* 213. He declared enormous tracts of land "forests"—and thus his personal

domain—and fined those who already lived there. "[T]he smallest encroachments on the part of the citizens were noticed and punished by exorbitant fines." 1 François Guizot, *History of the English Revolution From the Accession of Charles I*, at 73 (Louise H.R. Coutier trans., 1838). "The Bounds of the Forest of Rockingham," for example, "were increased from six Miles to sixty," and landowners within the new boundaries were fined between £3,000 and £20,000. Letter from George Garrard to Thomas Wentworth, Oct. 9, 1637, *reprinted in* 2 *The Earl of Strafforde's letters and dispatches* 117 (William Knowler ed., 1739). With good reason, Parliament's "Grand Remonstrance"—issued on the brink of the English Civil War—repeatedly cited the king's fines as "against all the rules of justice." The Grand Remonstrance ¶ 17 (1641), *reprinted in The Constitutional Documents of the Puritan Revolution, 1625–1660*, at 202–32 (Samuel Rawson Gardiner ed., 3d ed. 1968); *see also id.* ¶¶ 37, 159–60.

b. Abusive economic sanctions became a political flashpoint again during the reigns of Charles's sons—Charles II and James II. "[T]owards the end of Charles II's reign, the courts imposed ruinous fines on the critics of the crown." *See* Lois G. Schwoerer, *The Declaration of Rights, 1689*, at 91 (1981). These practices caused renewed tensions with Parliament. In 1681, the House of Commons tried (unsuccessfully) to impeach the Lord Chief Justice of the King's Bench based in part on his "notorious[] depart[ure] from all Rules of Justice and Equality, in the Imposition of Fines upon Persons convicted of Misdemeanors."

Articles of Impeachment of Sir William Scroggs, 9 Journals of the House of Commons 698 (Jan. 3, 1681) (reprint 1803). The Lord Chief Justice and his subordinates were said to have deliberately imposed lenient fines on Catholics and harsh ones on Protestants, "[b]y which arbitrary, unjust, and partial Proceedings, many of his Majesty's Liege People have been ruined." *Id.*; *see also* Schwoerer, *supra*, at 91.

Abuses worsened when the king's friends gained a personal stake in fines and forfeitures. Embracing a long-discredited practice, Charles II and James II outsourced their fining power to courtiers, foresters, and other people who would pay for the privilege. *See, e.g.*, *Calendar of State Papers, Domestic Series, of the Reign of Charles II, 1661–1662*, at 234 (Mary A.E. Green ed., 1861) (reprint 1968) (recording a petition for "lease for 21 years of the King's moiety of all fines and forfeiture on penal statutes and recognizances" in Devon, in exchange for £30 rent). Such self-interested prosecutors (as Sir Edward Coke warned a generation before) would use "undue means" and "violent prosecution" to pursue "private lucre." *See* Schwoerer, *supra*, at 96 & n.223. "Nothing has been more practiced," said Richard Hampden (later, a member of the 1689 rights committee), "nor more have suffered under, than when upon an Indictment the Fine is begged." 9 *Debates of the House of Commons from the Year 1667 to the Year 1694*, at 44 (Anchitell Grey ed., 1763); *see also* Schwoerer, *supra*, at 96 ("In 1680 . . . an M.P. blamed exorbitant fines on the begging of fines by courtiers, who then put pressure on the bench to set the fine at a large figure.").

Matters deteriorated further in the years leading up to the Glorious Revolution. "In the 1680's the use of fines 'became even more excessive and partisan,' and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Browning-Ferris Indus.*, 492 U.S. at 267 (quoting Schwoerer, *supra*, at 91). The sheriff of London "was fined £100,000 in 1682 for words spoken against the duke of York." Schwoerer, *supra*, at 91. "In 1684 Sir Samuel Barnardiston was fined £10,000 for writing letters alleged to be seditious; the sum was so huge that he languished in prison and his estate was ruined." *Id.* In a case against John Hampden—another future member of the 1689 rights committee—the notorious Judge Jeffreys ruled that Magna Carta's limitations on "amercements" did not apply at all "to fines for offenses against the king." *Id.*; *see also* 9 *Cobbett's Complete Collection of State Trials* 1053 n.*, 1125 (1811).[4]

Against this backdrop, Parliament paid careful attention to the sovereign's power to punish after James II abdicated in 1688. Cataloging how the king had acted "utterly and directly contrary to the knowne Lawes and Statutes and freedom of this Realme," 1 Wm. & Mary, 2d Sess., ch. 2 (1689), in 6 Statutes of the

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[4] *See generally* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 87 (1998) ("[I]n the late eighteenth century, every schoolboy in America knew that the English Bill of Rights' 1689 ban on excessive bail, excessive fines, and cruel and unusual punishments—a ban repeated virtually verbatim in the Eighth Amendment—arose as a response to the gross misbehavior of the infamous Judge Jeffreys.").

Realm 142–45 (reprint 1963), the English Bill of Rights devoted two paragraphs to abusive fines. In addition to "Excessive fines," the king had made "severall Grants and Promises . . . of Fines and Forfeitures"—giving away or selling the power to collect fines. *Id.* Parliament sought to ensure that England's "Religion Lawes and Liberties might not againe be in danger of being Subverted," and so provided "[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." *Id.* Freedom from excessive fines, the Bill of Rights confirmed, was one of the "a[nc]ient Rights and Liberties" of English subjects. *Id.*

3. Across the Atlantic, this history helped shape the American colonists' view of their fundamental rights. In the 1630s—during the Puritan emigration to America—one of England's leading Puritan politicians was twice fined £5,000 (and mutilated) for seditious libel. Ethyn Williams Kirby, *William Prynne: A Study in Puritanism* 29, 42 (1931). During the persecution of the Quakers, William Penn was fined 40 marks for refusing to remove his hat in an English court. When a jury refused to convict Penn of the underlying charge (unlawful assembly), the court fined the jurors too. John A. Phillips & Thomas C. Thompson, *Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and Bushell's Case*, 4 Law & Ineq. 189, 203, 214 (1986). A decade later, Penn's "Frame of the Colony of Pennsylvania" would provide "[t]hat all fines shall be moderate, and saving men's contenements, merchandize, or wainage." Nicholas M. McLean, *Livelihood, Ability to*

Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 866 (2013). New Yorkers included a similar provision in their charter in 1683. *See id.* And during a short-lived revolt in Maryland, in 1689, the rebels' grievances included: "[T]he Imposseinge Exessive fines Contrary to magna Charta." *Id.* (quoting "Mariland's Grevances Wiy The Have Taken Op Arms" (Beverly McAnear ed.), *reprinted in* 8 J. S. Hist. 392, 401 (1942)).

A century later, the right to be free from excessive fines remained fundamental to the citizens of the new United States. In 1776, the Virginia Convention adopted a Declaration of Rights, which drew verbatim from the English Bill of Rights: "[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Va. Decl. of Rights of 1776, § 9. Delaware followed suit later that year, with a "declaration of rights and fundamental rules of this State" that mirrored Virginia's Section 9 almost word for word. *See* Del. Const. of 1776, art. 30; Del. Decl. of Rights § 16 (Sept. 11, 1776). In the Northwest Ordinance, the Confederation Congress provided that "[a]ll fines shall be moderate" northwest of the Ohio River. Northwest Ord. § 14, art. 2 (1787).

By 1790, nine of the 13 States included excessive-fines protections in their constitutions. *See* Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1517 & nn.269 & 271 (2012) (collecting provisions). While still independent, Vermont adopted

equivalent language—requiring that "all fines shall be proportionate to the offences." *Id.* at 1517 & n.272 (quoting Vt. Const. of 1786, Plan or Frame of Gov't, § 29). And with Vermont's admission to the Union, in March 1791, three-quarters of the American population lived in States with explicit prohibitions on excessive fines in their state charters. *Id.* at 1517–18; *cf. McDonald*, 561 U.S. at 769 (looking to state constitutions during the period surrounding ratification of the Bill of Rights to determine incorporation).

The same mistrust of the power to punish inspired ratification of the Eighth Amendment in 1791. The Amendment's "primary focus . . . was the potential for governmental abuse of its 'prosecutorial' power," *Browning-Ferris Indus.*, 492 U.S. at 266, with the Excessive Fines Clause in particular "limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends," *id.* at 267. Even opponents of the Bill of Rights viewed the right to be free from excessive fines as fundamental to the new Nation's legal system. Edmond Randolph, for instance, thought the right so fundamental that it would be foolish to enumerate it: "As to the exclusion of excessive bail and fines, and cruel and unusual punishments," he argued, "this would follow of itself, without a bill of rights." 3 *The Debates of the Several State Conventions on the Adoption of the Federal Constitution* 467–68 (Jonathan Elliot ed., 1854). By ratifying the Excessive Fines Clause and its surrounding protections, the American people thus enshrined a well-established "liberty of their heritage." Laurence Claus,

The Antidiscrimination Eighth Amendment, 28 Harv. J.L. & Pub. Pol'y 119, 134 (2004).

B. When the Fourteenth Amendment was ratified, the right to be free from excessive fines remained fundamental to our Nation's legal system.

Americans continued to cherish their freedom from excessive fines 75 years later, when the Fourteenth Amendment was ratified. As Congress debated the language of the proposed Amendment, in 1866, members regarded the right as essential to our system of ordered liberty. And when the States ratified the Amendment, in 1868, each of their state constitutions included an enumerated protection against excessive fines. As the history of this period confirms, the Excessive Fines Clause was among the provisions of the Bill of Rights that the Fourteenth Amendment incorporated against the States.

1. The years following the Civil War illustrate how economic sanctions threatened to undermine the rights of the Nation's most oppressed citizens. Across the South in 1865–66, lawmakers adopted "Black Codes," which violated the fundamental liberties of newly freed slaves and their supporters. *See generally* Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 35 (1986). Economic sanctions were a common feature of the Black Codes, with southern States using fines and forfeitures to subjugate African Americans and

protect the status quo. *Cf. McDonald*, 561 U.S. at 771 (discussing the Black Codes to analyze incorporation of the Second Amendment). For example, in 1866, Alabama provided that any judge, minister, or officiant who married an interracial couple would "be fined not less than one hundred, nor more than one thousand dollars" and could face six months' imprisonment. 1866 Ala. Penal Code p. 31, § 62, *reprinted in* 1 *Documentary History of Reconstruction* 274 (Walter L. Fleming ed., 1950) (Fleming).

Alabama was not alone in using fines as a tool for oppression. Florida, for example, made it a misdemeanor to "entice, induce, or otherwise persuade" any person to break a labor contract, providing that offenders "shall be fined in a sum not exceeding one thousand dollars, or shall stand in the pillory not more than three hours, or be whipped not more than thirty-nine stripes on the bare back, at the discretion of the jury." Acts & Resolutions of General Assembly of Florida, 1865–66, p. 32, § 5, *reprinted in* 1 Fleming 277. Teaching at a school for "persons of color" without a special license triggered a fine of "not less than one hundred dollars, nor more than five hundred dollars," unless the court imposed a prison sentence. *Id.*, p. 37, § 11, *reprinted in* 1 Fleming 278–79. In Louisiana's St. Landry Parish, African Americans were prohibited from preaching "to congregations of colored people" without permission—a crime that triggered a $10 fine, ten days' work on a public road, or physical punishment. Senate Ex. Doc. No. 2, 39th Cong., 1st Sess., p. 93, *reprinted in* 1 Fleming 280; *see also* 1 Fleming 279

(explaining that Louisiana implemented Black Codes at the parish level). If an African American were so much as "found drunk" in St. Landry, he or she would be fined "five dollars, or in default thereof work five days on the public road," unless the court imposed physical punishment. Senate Ex. Doc. No. 2, 39th Cong., 1st Sess., p. 93, *reprinted in* 1 Fleming 281.

Mississippi adopted similar measures backed by stiff fines, forfeitures, and—for those who failed to pay—a system of debt-slavery that closely resembled chattel slavery. Adult "freedmen, free negros and mulattoes" were required to have a job; those without a job faced $50 in fines and ten days' imprisonment. 1865 Miss. Laws p. 90, § 2, *reprinted in* 1 Fleming 284. Any "white persons" associating with people of color "on terms of equality" faced a $200 fine or six months' imprisonment. *Id.* If a black laborer "quit the service of [an] employer before the expiration of his term of service," he would "forfeit his wages for that year up to the time of quitting." *Id.* p. 82, § 6, *reprinted in* 1 Fleming 288. African Americans who dared "exercis[e] the function of a minister of the Gospel without a license" faced fines of "not less than ten dollars, and not more than one hundred dollars" and could be imprisoned for up to 30 days. 1865 Miss. Laws p. 165, § 2, *reprinted in* 1 Fleming 290. People convicted of any one of these crimes had just five days to pay or they would be arrested and leased to "any person who will, for the shortest period of service, pay said fine and forfeiture and all costs." *Id.*, p. 90, § 5, *reprinted in* 1 Fleming 285; *id.*, p. 165, § 5, *reprinted in* 1 Fleming 290.

Vagrancy laws were another invidious feature of the Black Codes, with some States using broadly worded restrictions to trap African Americans in de facto slavery. "Every southern state except Arkansas and Tennessee had passed laws by the end of 1865 outlawing vagrancy and so vaguely defining it that virtually any freed slave not under the protection of a white man could be arrested for the crime." Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*, at 53 (2008). Once convicted, vagrants often would be sold into de facto slavery by state or local governments; almost all southern States "provided for the hiring-out of vagrants" along with "other county prisoners who could not pay their fines and costs." William Cohen, *At Freedom's Edge: Black Mobility and the Southern White Quest for Racial Control, 1861–1915*, at 33 (1991).

These and other provisions of the Black Codes galvanized support in Congress for reformulating the relationship between the federal government and the States. *See* Curtis, *supra*, at 35, 48–49, 51–56. In the Civil Rights Act of 1866, Congress provided that all citizens "shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." 14 Stat. 27. Section 14 of the Freedmen's Bureau Act of 1866 similarly outlawed "penalt[ies] or punishment[s]" based on race. 14 Stat. 177. Around the same time, Congress passed the joint resolution that would become the Fourteenth Amendment. *See*

Hurd v. *Hodge*, 334 U.S. 24, 32 (1948). Throughout the debates on these measures, members of Congress recognized that economic sanctions posed a serious threat to personal liberty and private property. For example, in early 1866, one member of the House protested that Alabama was allowing "vagrants" to be "sold to the highest bidder" and that Mississippi had made it a crime for African Americans simply to lose their jobs. Cong. Globe, 39th Cong., 1st Sess. 588–90 (1866) (Rep. Donnelly). Another member decried what he viewed as an effort to reverse emancipation:

> Vagrant laws have been passed; laws which, under the pretense of selling these men as vagrants, are calculated and intended to reduce them to slavery again; and laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude . . . .

Id. at 1123–24 (Rep. Cook). One Senator similarly condemned Florida's system of punitive fines:

> Going across a piece of pasture ground, traveling through a forest belonging to an individual, cutting a twig from a standing tree, anything which amounts to a trespass willfully done may be punished by a fine not exceeding $1,000, which fine may be collected by selling the services of the man until he can work out the fine . . . .

Id. at 443 (Sen. Howe); *see also id.* ("A thousand dollars! That sells a negro for his life."). And another lawmaker drew attention to the Black Code of

Opelousas, Louisiana (the seat of St. Landry Parish), which included a provision requiring that African Americans obtain special permission to sell merchandise, on pain of forfeiture of the items, as well as "imprisonment and one day's labor, or a fine of one dollar." *Id.* at 516–17 (Rep. Elliot).

These catalogued abuses (among others) persuaded Congress and the ratifying public of the need for greater constitutional protections against the States. As a result, Section 1 of the Fourteenth Amendment secured a baseline of federal constitutional rights, providing that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *see also McDonald*, 561 U.S. at 754; *cf. Hurd*, 334 U.S. at 32. The Nation in this way deemed existing constitutional protections—both state and federal—insufficient to guarantee certain indispensable rights, including the right to be free from excessive fines.

2. State-level protections drive home the point. At the same time that some southern States were violating their residents' fundamental rights, *see* pp. 19–22, *supra*, all States ranked the right to be free from excessive fines as fundamental. When the Fourteenth Amendment was ratified, in 1868, 35 of the 37 States (representing 92 percent of the American population at the time) included provisions in their state constitutions mirroring the language of the Excessive Fines Clause. *See* Steven G. Calabresi & Sarah E. Agudo,

Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 Tex. L. Rev. 7, 82 (2008). The two remaining States included proportionality clauses, enshrining the same basic right. *See* Ill. Const. of 1848, art. XIII, § 14; Vt. Const. of 1793, ch. II, § 32. As a result, every State that ratified the Fourteenth Amendment ranked protection from excessive fines as essential to our Nation's legal system. *Cf. McDonald*, 561 U.S. at 777 (looking to state constitutions during the period surrounding the Fourteenth Amendment's ratification). Every State continues to do so today. *See* Br. in Opp'n to Pet. for Cert. 8 (citing McLean, *supra*, at 876–77 & n.177).

The history surrounding the Eighth and Fourteenth Amendments thus confirms that the right to be free from excessive fines is "among those fundamental rights necessary to our system of ordered liberty." *See McDonald*, 561 U.S. at 778.[5]

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[5] The Court has already "incorporated almost all of the provisions of the Bill of Rights." *McDonald*, 561 U.S. at 764. Only a handful of protections remain unincorporated (or have yet to be addressed). With respect to the Fifth Amendment's Grand Jury Clause and the Seventh Amendment's right to a civil jury trial, the decisions rejecting their incorporation both "long predate the era of selective incorporation." *Id.* at 765 n.13. Under the selective-incorporation doctrine, the Court has concluded that the Sixth Amendment right to a criminal jury trial can be fulfilled without applying every dimension of that right to the States. *See Apodaca* v. *Oregon*, 406 U.S. 404, 407–11 (1972) (plurality opinion); *see also McDonald*, 561 U.S. at 766 n.14 (explaining the "unusual division among the Justices" in *Apodaca*). The Court has yet to address the Third Amendment and the Sixth Amendment's Vicinage Clause. And, of course, there is "a surprising amount of

C. The right to be free from excessive fines remains fundamental today.

In considering whether the Second Amendment is incorporated, three Members of the Court in *McDonald* evaluated not only the right's history, but also whether it had "remained fundamental over time." *See* 561 U.S. at 917 (Breyer, J., dissenting). Their analysis included "the extent to which incorporation will further other, perhaps more basic, constitutional aims" and whether incorporation would protect against laws "targeting 'discrete and insular minorities.'" *Id.* at 918, 921. By these metrics, the right to be free from excessive fines continues to be fundamental today. Like imprisonment, economic sanctions can effectively control a person's life, strip them of their property, and deprive them of their freedom. And as Indiana illustrates, these sanctions remain prone to abuse, with the government's impulse to raise "royal revenue" competing with its duty to act fairly and justly. *See Browning-Ferris Indus.*, 492 U.S. at 271.

1. The power to fine people and confiscate their property is the power to limit their freedom. Although modern fines seldom trigger "imprisonment for life," 4 William Blackstone, Commentaries *373, they can "amount to perpetual punishment" in other ways, *see* Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 2 (2016). Losing a car or a home to forfeiture can be "financially devastating."

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confusion as to whether the Excessive Fines Clause has been incorporated." *SFF-TIR, LLC* v. *Stephenson*, 262 F. Supp. 3d 1165, 1224–30 n.78 (N.D. Okla. 2017) (internal quotation marks omitted).

Beth A. Colgan, "Fines, Fees, and Forfeitures" in 4 *Reforming Criminal Justice: Punishment, Incarceration, and Release* 207 (Erik Luna ed., 2017). The same is true of criminal debt. Defaulters may see their driver's licenses suspended or their voting rights withheld—often with no regard for their ability to pay. Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry* 24, 29 (2010). Even low-level offenders are subject to court monitoring until their fines are paid in full, which for some people can mean the rest of their lives. Harris, *supra*, at 16.

Others are jailed. Until recently, courts in Ferguson, Missouri, issued arrest warrants "as a routine response to missed court appearances and required fine payments." U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 3 (Mar. 4, 2015). Other state courts have established "auto-jail" policies for people who fail to pay their fines on time. *See State* v. *Nason*, 233 P.3d 848, 852 (Wash. 2010) (invalidating county's auto-jail provision); *see also Cain* v. *City of New Orleans*, 281 F. Supp. 3d 624 (E.D. La. 2017) (invalidating a similar policy), *appeal docketed*, No. 18-30955 (5th Cir. Aug. 22, 2018). Still others make defendants choose between payment and incarceration. *See* ACLU, *In for a Penny: The Rise of America's New Debtors' Prisons* 22–24 (2010) (detailing "fines or time" sentences in New Orleans Parish municipal courts). As the Framers of the Eighth and Fourteenth Amendments understood, the government's power to fine can have grave consequences for personal liberty.

2. The sovereign power to fine also remains uniquely prone to abuse. Unlike every other form of punishment (all of which cost the government money), "fines are a source of revenue." *Harmelin* v. *Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.). So "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Id.* Because "the State stands to benefit," *id.*, there is a pronounced risk that governments—federal, state, and local alike—will exercise their prosecutorial powers not to do justice, but to raise revenue.

In the 150 years since the Fourteenth Amendment was ratified, this risk has become reality time and again. For decades after the Civil War, fines fueled the peonage system, under which Southern whites kept black citizens in bondage. African Americans would be charged with "trivial offences" (or fabricated ones) and fined far beyond their ability to pay. *See* Mary Church Terrell, *Peonage in the United States: The convict lease system and the chain gangs*, in No. 366 The Nineteenth Century and After 306, 312–13 (1907). White landowners, sometimes colluding with local sheriffs and judges, would then pay the defendant's fines. In exchange, the defendant would be legally bound to work off the debt on a private plantation. *See id.* "The exhausting cruelty of the penal system made almost any private servitude preferable." Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The*

Peonage Cases, 82 Colum. L. Rev. 646, 653 (1982). So "[t]o avoid the chain gang, black convicts signed up with private employers who would pay their fines in return for much longer periods of forced labor." *Id.*

In this way, the peonage system used fines to keep African Americans in servitude well into the twentieth century. Demand for forced labor only increased as Southern industry modernized, which in turn "exerted powerful pressures on the criminal justice system." *Id.* at 692. "Small offenses were punished with sizable fines, and serious crimes were scaled down to misdemeanors so that fines could be assessed and undertaken by employers." *Id.*; *see also* Blackmon, *supra*, at 65. Some of these debt-slaves would never be free. Writing in 1907, activist Mary Church Terrell had "no doubt whatever that there are scores, hundreds perhaps, of coloured men in the South to-day who are vainly trying to repay fines and sentences imposed upon them five, six, or even ten years ago." Terrell, *supra*, at 313. Those who broke free would be rearrested and fined again, or prosecuted for fleeing, and so "kept chained to an everturning wheel of servitude." *United States* v. *Reynolds*, 235 U.S. 133, 146–47 (1914); *see also* Blackmon, *supra*, at 137–38, 145–46.

In the twenty-first century, punitive economic sanctions continue to be used "for raising revenue in unfair ways." *Browning-Ferris Indus.*, 492 U.S. at 272. Particularly at the state and local levels, "many lawmakers use economic sanctions in order to avoid increasing taxes while maintaining governmental services." Beth A. Colgan, *The Excessive Fines Clause:*

Challenging the Modern Debtors' Prison, 65 UCLA L. Rev. 2, 22 (2018). "[S]ome lawmakers even includ[e] increases in ticketing in projected budgets." *Id.* These sanctions "are disproportionately imposed on impoverished defendants," who often lack the political clout to object. *See* Harris, *supra*, at 14; *see also* Colgan, *Challenging the Modern Debtors' Prison*, *supra*, at 23. In Ferguson, for example, the Department of Justice determined that "[c]ity officials . . . consistently set maximizing revenue as the priority for . . . law enforcement activity." U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 9. The resulting policy of "aggressive code enforcement" fell hardest on the city's low-income, African American residents. *Id.* 4, 11.

And Ferguson is not unique. In nearby Pagedale, city officials adopted an aggressive code-enforcement strategy after state lawmakers capped the amount of revenue that cities could collect from traffic tickets. *See* Jennifer S. Mann, *Municipalities ticket for trees and toys, as traffic revenue declines*, St. Louis Post-Dispatch (May 24, 2015), https://tinyurl.com/y9owqnl4. Pagedale residents found themselves fined relentlessly for trivial violations like wearing sagging pants or having toys in front yards. *Id.* Even enjoying a beer within 150 feet of a grill could lead to a fine. Jennifer S. Mann, *Lawsuit filed against Pagedale for ticketing high grass and other code violations*, St. Louis Post-Dispatch (Nov. 4, 2015), https://tinyurl.com/yaf4h6s3. The number of non-traffic tickets in the city spiked 495 percent over a five-year period. Mann, *Municipalities ticket for trees and toys*, *supra*. In 2014, the city issued nearly enough

non-traffic tickets for every household in Pagedale to receive two. *Id.*; *see also* Consent Decree, *Whitner* v. *City of Pagedale*, No. 15-cv-1655 (E.D. Mo. May 21, 2018).

Civil forfeiture is exploited in similar ways. *See generally Hudson* v. *United States*, 522 U.S. 93, 103 (1997) ("The Eighth Amendment protects against excessive civil fines, including forfeitures." (citing *Austin* v. *United States*, 509 U.S. 602, 622 (1993)). At the federal level, and in many States, when property is forfeited most (and often all) of the resulting proceeds go directly to law enforcement, frequently into the coffers of the seizing agency itself. As a result, state and federal law-enforcement agencies increasingly use civil forfeiture as a revenue-raising tool. In 2012, agencies in 26 States and the District of Columbia took in more than $254 million through forfeiture under state laws alone. Institute for Justice, Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 11 (2d ed. 2015) (noting that deriving totals for all 50 States is "impossible because most states require little to no public reporting of forfeiture activity"). And nationwide, the modern civil-forfeiture system "has led to egregious and well-chronicled abuses." *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). Like economic sanctions more broadly, forfeitures "frequently target the poor and other groups least able to defend their interests in forfeiture proceedings." *Id.*; *cf. McDonald*, 561 U.S. at 921 (Breyer, J., dissenting) (inquiring

whether the right at issue protects against laws that "target[ ] 'discrete and insular minorities' ").

3. Indiana—where this case arises—highlights some of the most dangerous practices in the Nation today. Unlike in every other State, Indiana statutes allow prosecutors to outsource civil-forfeiture cases to private lawyers on a contingency-fee basis. This case, for example, was prosecuted by a private law firm. *See* State C.A. App. pp. 10–11 (complaint). And even while the Petition for Certiorari was pending, Indiana codified fixed percentages of civil-forfeiture revenue that private-sector lawyers can collect. Ind. P.L. 47-2018, § 5; *see generally* David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.01, at 1-13 (2018) ("The biggest scandal of all is Indiana's institutionalized bounty hunter system in which state [prosecutors] contract with *private* attorneys to handle all of the county's civil forfeiture cases for a contingent fee of a quarter or a third of all the property they forfeit.").

This system of mercenary prosecutors magnifies the Excessive Fines Clause's animating concern: that prosecutorial power will be harnessed "for raising revenue in unfair ways, or for any other improper use." *Browning-Ferris Indus.*, 492 U.S. at 272. Predictably, private-sector lawyers in Indiana pocket hundreds of thousands of dollars every year based on forfeitures. *See generally* Heather Gillers et al., *Cashing in on crime: Indiana law allows prosecutors to farm out forfeiture cases to private lawyers—who get a cut of the money*, The Indianapolis Star, Nov. 14, 2010, at A1. One deputy prosecutor even litigated criminal cases while

moonlighting as a contingency-fee lawyer in related forfeiture proceedings. "On numerous occasions when the ethics of the asset forfeiture procedures were called into question," the Indiana Supreme Court later found, "[the prosecutor] turned a blind eye and acted to protect his private interest in his continued pursuit of forfeiture property." *In re McKinney*, 948 N.E.2d 1154, 1155–56 (Ind. 2011). In the same county, a trial court condemned such practices as "a carefully crafted assault on the judicial system and court adjudication in civil forfeitures." *Findings and Report on Civil Drug Forfeitures in Division 2, Including a Limited Number of Cases in the Other Four Divisions of the Delaware Circuit Court*, at 6 (Ind. Cir. Ct. Aug. 18, 2008), https://tinyurl.com/ybjkw7z8; *see also* Ind. P.L. 47-2018, § 5 (barring deputy prosecutors from entering into forfeiture contracts).

Law-enforcement officials in Indiana do not hide the fact that they view economic sanctions as an important source of revenue. For example, Indianapolis police set annual targets for their state and federal forfeiture funds. *See, e.g.*, Hrg. of Indianapolis City-Cty. Council Pub. Safety & Crim. Justice Comm. (July 18, 2012), at 36:36–37:15, https://tinyurl.com/y9b5cpqr. And last year, another county's prosecutor told the General Assembly that he would abandon forfeiture altogether if his office were to lose its stake in forfeiture revenue: "I'm not going to hire anybody to do forfeitures to collect money for the State of Indiana. If my office isn't getting money, I'm not going to be able to pay them for that, and—why am I going to do the extra

work and not have some benefit that comes out of it?" Hrg. of Ind. Senate Corrs. & Crim. Law Comm. (Jan. 10, 2017), at 2:27:11–2:27:23, https://tinyurl.com/y9hnzrto.

For ordinary citizens, the real-world consequences can be devastating. With economic sanctions serving as both punishment and revenue source, "law enforcement Weapons of Mass Destruction" are increasingly deployed against "pedestrian targets." *Sargent* v. *State*, 27 N.E.3d 729, 735 (Ind. 2015) (Massa, J., dissenting). As one prosecutor announced after law enforcement in Indiana first gained a financial stake in civil forfeiture, "the statute is limited only by your own creativity." Joseph T. Hallinan, *Police can take crime cash but can't dish it out*, The Indianapolis Star, Feb. 2, 1986, at 6B. And prosecutors have been creative. In one case, prosecutors sued to forfeit a teenager's car, after it was found with "a large quantity of Gatorade bottles and assorted snacks and candies" stolen from a playground concession stand. *See* Pls.' Mot. Summ. J., *State* v. *Jaynes*, No. 49D01-1111-MI-043642, 2012 WL 12974140 (Ind. Super. Ct. May 23, 2012); *see also* Ind. Code § 34-24-1-1(a)(1)(B) (providing for forfeiture of any vehicle used to transport stolen property valued at $100 or more). In another case, prosecutors attempted to forfeit a woman's 1996 Buick Century after she tried (and failed) to shoplift four iPhones. *Sargent*, 27 N.E.3d at 731. When the Indiana Supreme Court rejected this forfeiture on statutory grounds, *see id.* at 733, even a dissenting justice voiced bewilderment at the State's "overreach," *id.* at 735 (Massa, J., dissenting).

Local officials in Indiana have even used economic sanctions to drive people from their homes. Since 2016, code-enforcement officers in Charlestown, Indiana, have flooded a low-income neighborhood with millions of dollars in property citations. Using fines, the mayor and the city sought to help a developer buy property in the neighborhood. A court later found: "The Mayor anticipated that the plan to enforce the . . . property-maintenance code . . . would impose such steep fines on the owners of the [neighborhood] properties that they would be willing to sell to a developer . . . for demolition." Findings of Fact & Conclusions of Law, *Charlestown Pleasant Ridge Neighborhood Ass'n* v. *City of Charlestown*, No. 10C02-1701-CT-010, 2017 WL 9934162, at ¶ 31 (Ind. Cir. Ct. Dec. 4, 2017), *appeal docketed*, 10A01-1712-CT-02896 (Ind. Ct. App. Dec. 15, 2017). The plan proved successful. With fines "add[ing] up to significant sums very quickly," *id.* ¶ 42, many landlords opted to sell to the developer, *id.* ¶ 44, forcing hundreds of low-income tenants to relocate as the developer began boarding up homes, *id.* ¶¶ 48-49.

It is precisely because these and other abuses persist that the right to be free from excessive fines remains "fundamental to our scheme of ordered liberty" today. *See McDonald*, 561 U.S. at 767 (emphasis omitted). Now—as in 1689, 1791, and 1868—economic sanctions combine the government's appetite for revenue with the "terrifying force of the criminal justice system." *Robertson* v. *United States ex rel. Watson*, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting from dismissal of certiorari). History demonstrates that abuses

will follow. For this reason, the Excessive Fines Clause remains an essential constitutional safeguard against unjust economic sanctions.

D. Applying the Clause to the States is consistent with Eighth Amendment precedent.

Finally, incorporating the Excessive Fines Clause is consistent with Eighth Amendment precedent. Although this Court in the late nineteenth century indicated that the Eighth Amendment did not apply to the States, *see In re Kemmler*, 136 U.S. 436, 448–49 (1890), it has long since "repudiated" that view, *Baze* v. *Rees*, 553 U.S. 35, 115 (2008) (Ginsburg, J., dissenting); *see also Malloy* v. *Hogan*, 378 U.S. 1, 6 n.6 (1964); *cf. McDonald*, 561 U.S. at 764 ("The Court eventually incorporated almost all of the provisions of the Bill of Rights."). Thus, the Cruel and Unusual Punishments Clause has been held to apply to the States for over half a century. *See Robinson* v. *California*, 370 U.S. 660, 666–67 (1962). Likewise, the Excessive Bail Clause has long "been assumed to have application to the States through the Fourteenth Amendment." *Schilb* v. *Kuebel*, 404 U.S. 357, 365 (1971); *see also Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). And in recent decades, the Court has remarked that the Eighth Amendment's three Clauses apply to the States with equal force. In *Kennedy* v. *Louisiana*, for example, the Court observed that "the separate States are bound by the proscriptive mandates of the Eighth Amendment." 554 U.S. 407, 412 (2008); *see also id.* at 419. In *Roper* v. *Simmons*, the

Court commented that the Eighth Amendment as a whole "is applicable to the States through the Fourteenth Amendment." 543 U.S. 551, 560 (2005). Many other opinions include statements to the same effect. *See supra* at p. 1 & n.1.

These statements confirm what to many state courts has long been obvious: The Excessive Fines Clause is incorporated against the States. The three Clauses of the Eighth Amendment embody "parallel limitations" on the government's power to punish. *Browning-Ferris Indus.*, 492 U.S. at 263. Put differently, they work together to "place[] limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." *Id.* at 275; *see also Austin*, 509 U.S. at 607. As a result, there is "no reason to distinguish one Clause . . . from another for purposes of incorporation." *Browning-Ferris Indus.*, 492 U.S. at 284 (O'Connor, J., concurring in part and dissenting in part). The Court should thus adhere to its prior statements and hold that the Excessive Fines Clause applies to the States.

II. The Excessive Fines Clause applies to the States under the Fourteenth Amendment's Privileges or Immunities Clause.

Although this Court's incorporation cases "have been built upon the substantive due process framework," *McDonald*, 561 U.S. at 812 (Thomas, J., concurring in part and concurring in the judgment), the

Privileges or Immunities Clause provides an alternative basis for applying the Excessive Fines Clause to the States.

1. The original public meaning of "privileges or immunities" was synonymous with "rights," *id.* at 813, and the right to be free from excessive fines ranks among those rights of citizenship that the Privileges or Immunities Clause protects. At the time of ratification, the Clause was publicly understood to "enforce[] at least those fundamental rights enumerated in the Constitution against the States." *Id.* at 835. Not only was the right to be free from excessive fines enumerated in the Constitution, it was regarded as fundamental long before the Founding. *Supra* at pp. 10–25. Like the right to keep and bear arms, then, the right to be free from excessive fines fits comfortably within the original public meaning of the Privileges or Immunities Clause.[6]

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[6] The rights in the first eight Amendments are not the only "privileges or immunities." *See, e.g.*, Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. Pa. J. Const. L. 1295, 1303 (2009); Amar, *supra*, at 208–10; Curtis, *supra*, at 41, 74–75, 219. On the contrary, as the principal author of the Fourteenth Amendment observed, the "privileges and immunities of citizens of the United States . . . are *chiefly* defined in the first eight amendments." Cong. Globe, 42d Cong., 1st Sess. App. 84 (1871) (emphasis added); *cf. McDonald*, 561 U.S. at 831 (Thomas, J., concurring in part and concurring in the judgment) (documenting public awareness that the Fourteenth Amendment would, "*at a minimum*, enforce constitutionally enumerated rights of United States citizens against the States") (emphasis added).

2. The Court need not overrule any prior decisions to rule for Petitioner based on the Privileges or Immunities Clause. Neither the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), nor subsequent decisions relying on *Slaughter-House* have squarely addressed whether the "privileges or immunities of citizens" include protection against excessive fines and whether that right applies to the States. *Cf. McDonald*, 561 U.S. at 808 (Thomas, J., concurring in part and concurring in the judgment) (noting that *Slaughter-House* "arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship"); *accord* Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 Minn. L. Rev. 102, 105 (2009) (noting that "[a] careful examination reveals nothing in *Slaughter-House* that is inconsistent with incorporation"). Because nothing in this Court's precedents answers the question whether the Privileges or Immunities Clause incorporates protection from excessive fines, no precedents necessarily need to be overruled to follow the original public meaning of the Privileges or Immunities Clause.

However, *Slaughter-House* should be overruled at least to the extent that the Court reads it to preclude incorporation under the Privileges or Immunities Clause. *See McDonald*, 561 U.S. at 855 (Thomas, J., concurring in part and concurring in the judgment).[7]

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[7] Virtually "everyone" agrees that *Slaughter-House* was wrongly decided. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the*

And to the extent that subsequent decisions have relied on the Court's reasoning in *Slaughter-House* to suggest—incorrectly—that the rights enumerated in the first eight Amendments are not "privileges or immunities of citizens of the United States," those decisions should also be overruled. *See Maxwell* v. *Dow*, 176 U.S. 581, 597 (1900); *O'Neil* v. *Vermont*, 144 U.S. 323, 332 (1892); *In re Kemmler*, 136 U.S. 436, 446 (1890). Despite *Slaughter-House* and its progeny, the correct textual and historical view of the Fourteenth Amendment would acknowledge that the Privileges or Immunities Clause provides an alternative basis for incorporation of, at minimum, the individual rights protected in the first eight Amendments.

In summary, incorporation of the Excessive Fines Clause is warranted under the Due Process Clause or the Privileges or Immunities Clause. Under either provision (or both), the Excessive Fines Clause applies to the States.

Slaughter-House Cases, 70 Chi. Kent L. Rev. 627, 627 (1994); *cf.* Laurence H. Tribe, *American Constitutional Law* 1320–21 (3d ed. 2000) ("The textual and historical case for treating the Privileges or Immunities Clause as the primary source of federal protection from state rights infringement is very powerful indeed."); Amar, *supra*, at 213 (explaining "[t]he obvious inadequacy—on virtually any reading of the Fourteenth Amendment—of [Justice] Miller's opinion" in *Slaughter-House*).

CONCLUSION

This Court should reverse the judgment of the Indiana Supreme Court and remand for further proceedings.

Respectfully submitted,

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No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

On Writ of Certiorari to the Indiana Supreme Court

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QUESTION PRESENTED

Whether the Excessive Fines Clause, via the Due Process Clause, is incorporated against state *in rem* forfeitures.

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INTRODUCTION

This case began with the State of Indiana's routine *in rem* forfeiture action against Tyson Timbs's Land Rover. Indiana law authorizes forfeiture of the Rover because Timbs used it to traffic heroin, but he argues that its value far exceeds the gravity of his crime and that the Eighth Amendment's Excessive Fines Clause—which he contends applies to the States under the Fourteenth Amendment—bars the forfeiture.

Timbs's claim fails at the starting gate: The Excessive Fines Clause does not impose a proportionality requirement on state *in rem* forfeitures, a feature of American law for more than three hundred years. *See C. J. Hendry Co. v. Moore*, 318 U.S. 133, 137–52 (1943). Even though forfeitures sometimes produce harsh results—the owner's innocence "has almost uniformly been rejected as a defense," *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974)—courts did not suggest that the Excessive Fines Clause might limit *in rem* forfeitures until the last quarter of the twentieth century. Indeed, only five earlier state-court cases even *mentioned* the argument Timbs makes here; all squarely rejected it.

The history of *in rem* forfeitures suggests two possible conclusions: the Excessive Fines Clause does not apply to *in rem* forfeitures—potentially conflicting with *Austin v. United States*, 509 U.S. 602, 621–22 (1993)—or the Fourteenth Amendment does not apply the Clause against the States. Either way, history requires the Court to reject Timbs's claim.

STATEMENT OF THE CASE

The investigation into Timbs's heroin trafficking began with a tip from a confidential informant and continued with two controlled drug purchases; each time, officers bought two grams of heroin from Timbs and scheduled a subsequent sale. Pet. App. 2. Police arrested Timbs and seized the Rover while he was on his way to the third sale. Hr'g. Tr. 13:13–25; 14:06–08 (July 15, 2015). While he was in custody, Timbs told officers that he would use the Rover to pick up heroin several times a week, Hr'g. Tr. 14:09–15:18, and at the forfeiture hearing, he said that doing so put "a lot" of miles on the vehicle. Hr'g. Tr. 36:09–14.

The State charged Timbs with two counts of Class B felony dealing in a controlled substance and one count of Class D felony conspiracy to commit theft. Pet. App. 3. Timbs pled guilty to the conspiracy count and one of the drug-dealing counts in exchange for dismissal of the remaining dealing charge. *Id.* The court sentenced Timbs to one year of home detention and five years of probation; Timbs also agreed to pay investigation costs of $385, an interdiction fee of $200, court costs of $168, a bond fee of $50, and a court-certified drug-and-alcohol assessment fee of $400, for a total of $1,203.00 in fees and costs. *Id.*

Indiana law authorizes the State to bring "an action for forfeiture" against property seized as an instrumentality of certain crimes, Ind. Code § 34-24-1-3(a), including vehicles used to transport heroin, *id.* § 34-24-1-1(a)(1)(A). The forfeiture action is entirely separate from any criminal prosecution, and, because

the State brings the action against the property itself, the action is a proceeding *in rem*. *C.R.M. v. State*, 799 N.E.2d 555, 558 (Ind. Ct. App. 2003). The federal government and nearly every other State utilize similar *in rem* forfeiture proceedings. *See United States v. Bajakajian*, 524 U.S. 321, 333 (1998) ("Instrumentalities historically have been treated as a form of 'guilty property' that can be forfeited in civil *in rem* proceedings."); Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446, 2451 (2016) (observing that most States have broad laws authorizing civil forfeiture, though eight States require predicate criminal convictions and one State has eliminated the procedure).

Accordingly, after the State seized the Rover, but while Timbs's criminal case was still pending, private lawyers acting under the authority of an elected prosecuting attorney filed a complaint on the State's behalf seeking forfeiture of the Rover under Indiana Code section 34-24-1-1(a)(1)(A). Compl. for Forfeiture (Aug. 5, 2013). Timbs's answer denied the allegations without raising any constitutional arguments. Answer (Aug. 29, 2013). After Timbs had pled guilty, the trial court held a hearing on the State's forfeiture action, and it found that the Rover met the statutory criteria for forfeiture because it was used to "transport . . . [a] controlled substance for the purpose of committing . . . [the crime of d]ealing in a schedule I . . . controlled substance . . . ." Ind. Code § 34-24-1-1(a)(1)(A); *see* J. Order ¶ 3 (Aug. 28, 2015).

Nevertheless, the trial court held—without hearing any argument from the parties on the point—that

the forfeiture would violate the Excessive Fines Clause. *Id.* ¶ 8. It noted that the Rover was valued at about $40,000, *id.* ¶ 1, and that the maximum fine applicable to the drug-dealing charge to which Timbs had pled guilty was $10,000, *id.* ¶ 6. Although Indiana law sets $10,000 as the maximum fine for *all* felonies, including murder, Ind. Code §§ 35-50-2-3 to -7, the trial court concluded that the approximately four-to-one ratio between the value of the Rover and the maximum fine for the drug-dealing charge was "grossly disproportional" and therefore unconstitutional under the Excessive Fines Clause. J. Order ¶¶ 7–8 (Aug. 28, 2015).

After filing an unsuccessful motion to correct error, the State appealed the trial court's decision, which the Indiana Court of Appeals affirmed. Pet. App. 17–24. The State then sought transfer to the Indiana Supreme Court, which reversed, holding that the Excessive Fines Clause does not bar the forfeiture because the Fourteenth Amendment does not incorporate the Excessive Fines Clause against the States. Pet. App. 9–10.

SUMMARY OF ARGUMENT

1. The question presented by this case is whether the right Timbs claims—that is, the right to be free from disproportionate *in rem* forfeitures—is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (internal quotation marks and emphasis omitted). Timbs

recognizes that this question is answered by examining the historical evidence. Pet. Br. 9–25. He is mistaken, however, about *which* evidence is relevant. Because this case involves an *in rem* forfeiture, the question is not whether *in personam* fines were traditionally subject to proportionality review, *cf. id.*, but instead whether proportionality requirements were historically applied to *in rem* forfeitures.

The Court should also reject the urging of *amici* to discard the settled framework for deciding incorporation questions in favor of constructing a new incorporation doctrine from the ground up. The historically informed, straightforward approach the Court described and used in *McDonald* is "well established." 561 U.S. at 750. Upsetting current doctrine would create numerous collateral consequences, all without changing the answer to the question presented by this case: The right Timbs claims is neither fundamental to nor deeply rooted in, America's legal tradition and therefore does not apply against the States.

2. For the vast majority of American history, *in rem* forfeitures have not been subject to a proportionality requirement. Even before the Revolution, authorities brought *in rem* proceedings against property used to violate the law. These proceedings sometimes resulted in severe consequences; courts have always rejected, for example, the innocence of the forfeited property's owner as a defense. Yet, in spite of the many opportunities to complain of "disproportionate" *in rem* forfeitures, not a *single* decision issued prior to the end of the twentieth century said that either a fed-

eral or state Excessive Fines Clause imposes a proportionality requirement on these forfeitures—even though virtually every State has such a Clause and even though courts regularly enforced Excessive Fines Clauses against criminal fines. The only five state-court cases prior to 1988 even to *acknowledge* the possibility of an Excessive Fines Clause limit on *in rem* forfeitures all explicitly rejected it. The courts' silence is powerful evidence that no such proportionality requirement exists, particularly in light of *other* challenges occasionally brought against *in rem* forfeitures based on constitutional provisions having nothing to do with proportionality.

The traditional conception of *in rem* forfeitures explains why the Excessive Fines Clause is inapplicable here. As multiple nineteenth-century treatises explained, *in rem* forfeitures are not penalties, and the Excessive Fines Clause applies only to a "*punishment* for some offense," *Austin v. United States*, 509 U.S. 602, 610 (1993) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). And it is hard to see how any proportionality requirement could be squared with courts' consistent approval of *in rem* forfeitures suffered by innocent owners.

3. The historical evidence establishes that, both before and after the ratification of the Fourteenth Amendment, the American legal tradition did not consider *in rem* forfeitures to be subject to a proportionality requirement. Accordingly, two potential interpretations are available. The better interpretation reads the Excessive Fines Clause *not* to apply to *in*

rem forfeitures and thereby fully harmonizes the historical evidence: It explains why Timbs cites many courts and commentators calling excessive *fines* unconstitutional but no authorities saying the same about *in rem* forfeitures. And *Austin*, which held that the Excessive Fines Clause *does* apply to two specific *federal in rem* forfeitures, is no reason to refuse to hold the Excessive Fines Clause inapplicable to *state in rem* forfeitures. If anything, the Court's subsequent decisions—to say nothing of the historical evidence—have undermined *Austin*'s reasoning.

If the Court interprets the Excessive Fines Clause to encompass *in rem* forfeitures, however, historical evidence permits just one other interpretation—that the Clause does not apply to the States. No evidence demonstrates that the American legal tradition ever recognized a rule prohibiting state *in rem* forfeiture of an instrumentality of crime where the value of the property is disproportionate to the seriousness of the violation. In short, no right of *in rem* forfeiture proportionality is "deeply rooted" in American history or tradition. *McDonald*, 561 U.S. at 767. The right Timbs claims, therefore, cannot be applied against the States.

ARGUMENT

I. The Question Before the Court Is Whether the Excessive Fines Clause, Via the Due Process Clause, Imposes a Proportionality Requirement on State *In Rem* Forfeitures

A. The Court should ask whether a proportionality requirement for *in rem* forfeitures is a fundamental and deeply rooted feature of American law

Reaching the right answer in this case requires first asking the right question. *Cf. Arizona v. Hicks*, 480 U.S. 321, 333 (1987) (O'Connor, J., dissenting) ("The Court today gives the right answer to the wrong question."). Here the right question is not whether the Excessive Fines Clause is incorporated as a general matter, but whether the Clause, in conjunction with the Fourteenth Amendment, prohibits the particular state action against which Timbs has lodged a constitutional objection—the *in rem* forfeiture of his Rover as an instrumentality of drug trafficking. *See* Ind. Code § 34-24-1-1. Timbs claims a constitutional right to be free from "disproportionate" *in rem* forfeitures. *See* Pet. Br. 6–7 (discussing decisions below accepting this argument); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality."). To enforce this right against Indiana, he must show that it "is fundamental to our scheme of ordered liberty, or as we have said in a related context, . . . is deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*,

561 U.S. 742, 767 (2010) (internal quotation marks and emphasis omitted).

1. The Court must examine the history of *in rem* forfeitures because the Court's incorporation cases frame the incorporation question in terms of the specific right asserted. In *McDonald*, for example, the Court did not look at the history of the Second Amendment in general but examined the history of the "right to keep arms for self-defense." *Id.* at 768; *see also id.* at 789 (rejecting arguments against "the case for incorporation of the right to keep and bear arms for self-defense").

The Courts' other incorporation cases have taken the same right-specific approach. For example, rather than incorporate all of the rights encompassed by the first clause of the Fourth Amendment all at once—"the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," U.S. Const. amend. IV—the Court first incorporated the Clause's reasonableness requirement, *Wolf v. Colorado*, 338 U.S. 25 (1949), and about fifteen years later incorporated the Clause's warrant requirement, *Aguilar v. Texas*, 378 U.S. 108 (1964). *See also McDonald*, 561 U.S. at 764 n.12. Similarly, rather than incorporate the "right to . . . an impartial jury," U.S. Const. amend. VI, wholesale, the Court has held that this Clause requires States to provide a jury trial to defendants charged with serious offenses, *Duncan v. Louisiana*, 391 U.S. 145 (1968), but that it does *not* incorporate a right to a unanimous verdict, *Apodaca v. Oregon*, 406 U.S. 404 (1972).

Focusing on the specific claimed right is particularly important here because the forfeiture Timbs challenges is very different from the criminal fines to which his historical evidence relates. The State imposed the forfeiture pursuant to an *in rem civil* proceeding against the Rover, not an *in personam criminal* proceeding against Timbs. *See C.R.M. v. State*, 799 N.E.2d 555, 558 (Ind. Ct. App. 2003); *see also Anonymous Case*, 1 Gal. 23 (1812) (Story, J.) ("[I]t is not true, that informations *in rem* are criminal proceedings. On the contrary, it has been solemnly adjudged that they are civil proceedings."). The validity of the forfeiture therefore turns not on *Timbs's* culpability but on the *Rover's*—whether it was used to transport drugs for the purpose of drug dealing. *See* Ind. Code § 34-24-1-1. And Indiana courts determine which—or how much—property goes to the State by considering the property's *involvement* in the crime, not the crime's *severity*. *Id.*

Timbs ignores this distinction. He frames the question presented at a high level of generality, asking "[w]hether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment," without addressing *in rem* forfeitures in particular. Pet. Br. i. And virtually all of the historical evidence he presents relates to criminal fines, not *in rem* forfeitures. *Id.* at 11–27.

Timbs's focus on criminal fines ignores the right-specific nature of the Court's incorporation cases, and it ignores the Court's role, which is "to decide concrete cases and not abstract propositions of law." *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981).

Whether the Constitution would prohibit a hypothetical $40,000 criminal fine for Timbs's crime is irrelevant. The only relevant question is whether the Constitution—specifically, the Excessive Fines Clause, via the Fourteenth Amendment—imposes a proportionality requirement on the State's *in rem* forfeiture of his Rover.

2. Even if the Court were to view the incorporation question at a higher level of generality and ask whether the Excessive Fines Clause *as a whole* is fundamental to, and deeply rooted in, the American legal tradition, the history of *in rem* forfeitures still would be essential to reaching the right answer. The Excessive Fines Clause can be "incorporated in the concept of Due Process" *in toto* only if *all* its protections—including its purported protection against disproportionate *in rem* forfeitures—are "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767 (internal quotation marks and emphasis omitted). The historical pedigree of the Excessive Fines Clause's restriction against disproportionate criminal penalties cannot by itself justify applying *other* purported constitutional limitations against the States.

The Court has *never* applied a purported constitutional limitation against the States after finding that it fails the "fundamental . . . or . . . deeply rooted" test. *McDonald*, 561 U.S. at 767. In *McDonald*, for example, the Court marshalled statements from the founding and Fourteenth Amendment ratification periods demonstrating that "the Framers and ratifiers of the

Fourteenth Amendment counted the right [to keep and bear arms for self-defense] among those fundamental rights necessary to our system of ordered liberty." *Id.* at 767–78. *See also, e.g., Mapp v. Ohio*, 367 U.S. 643, 656–57 (1961) ("We find that . . . as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty (secured) . . . only after years of struggle.'" (second ellipsis in original)); *Duncan*, 391 U.S. at 149 ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases.").

Contrariwise, in *Apodaca*, the Court concluded that the jury-unanimity requirement is not sufficiently fundamental to justify application against the States. *See* 406 U.S. at 373 (Powell, J., concurring in the judgment) (explaining that "[t]he question . . . is whether unanimity is in fact so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily binding on the States under the Due Process Clause of the Fourteenth Amendment").

In short, there is no precedent for incorporating all limitations recognized by a clause in the Bill of Rights where some of those limitations lack fundamental grounding in American history and traditions.

***

Whether the Court views the incorporation inquiry on a right-by-right or a clause-by-clause basis, it should focus on *in rem* forfeitures specifically—not merely *in personam* fines. Timbs must identify historical evidence showing that the American legal tradition has consistently applied, and recognized as significant, his claimed right to a proportionality requirement for *in rem* forfeitures. *See McDonald*, 561 U.S. at 767. History is particularly important here because the meaning of the Excessive Fines Clause, as in "other Eighth Amendment contexts," is "illuminated by its history." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 & n.4 (1989). "The applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation." *Id.* at 264 n.4 (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 n.39 (1977)). The history forecloses Timbs's argument: *In rem* forfeitures have been common throughout American history, but courts did not recognize the right Timbs claims—much less declare it fundamental—until the end of the twentieth century. *See infra*, Part II.

B. The Court should not revisit whether incorporation should occur via the Privileges or Immunities Clause

As Timbs recognizes, the Court's incorporation doctrine has long "been built upon the substantive due process framework," Pet. Br. 37 (quoting *McDonald*, 561 U.S. at 812 (Thomas, J., concurring in part and concurring in the judgment)). Timbs briefly suggests that the Fourteenth Amendment's Privileges or

Immunities Clause provides an alternative basis for incorporating the Excessive Fines Clause against the States, *id.* 37–38, but—unlike some *amici*, Cause of Action Inst. Amicus Br. 10–16; Am. Civil Rights Union Amicus Br. 12–20—he wisely does not ask the Court to depart from its "long established and narrowly limited" incorporation doctrine. *McDonald*, 561 U.S. at 791 (Scalia, J., concurring). The Court should not use this case to rebuild incorporation doctrine on a new foundation.

1. First, there is no reason for the Court "to reconsider" incorporation via the Privileges and Immunities Clause, "since straightforward application of settled doctrine suffices to decide [this case]." *Id.* Timbs does not argue that considering incorporation under the Privileges or Immunities Clause would meaningfully change the analysis here. Pet. Br.at 38 (asserting that the right to be free from excessive fines "was regarded as fundamental long before the Founding" and citing prior historical discussion arguing for incorporation under the Due Process Clause). And there is no reason to believe it would: In *McDonald*, the Court's most recent incorporation case, Justice Thomas's concurrence concluded that the Privileges or Immunities Clause incorporates the right to bear arms for self-defense on the basis of much of the same historical evidence discussed in the Court's Due Process Clause analysis. *See McDonald*, 561 U.S. at 844–50 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 838 ("As the Court demonstrates, there can be no doubt that § 1 was understood to enforce the Second Amendment against the States." (citing the opinion of the Court)).

Under both the Due Process Clause and the Privileges or Immunities Clause, the imposition of a proportionality requirement to States' *in rem* forfeitures turns on whether historical evidence shows widespread acceptance and recognition of the importance of this rule.

2. Second, changing the foundation of the Court's incorporation doctrine at this late date—after it has considered incorporation of nearly every provision in the Bill of Rights—could create a host of unpredictable consequences and sow confusion among lower courts and state and local governments.

For example, while the Due Process Clause applies to "any person," the Privileges or Immunities Clause protects "citizens of the United States," U.S. Const. amend. XIV, and a change in the Court's doctrine could leave the country wondering which provisions of the Bill of Rights would apply only to citizens. *Compare McDonald*, 561 U.S. at 815 (Thomas, J., concurring in part and concurring in the judgment) ("The group of rights-bearers to whom the Privileges or Immunities Clause applies is, of course, 'citizens.'"); *with Boumediene v. Bush*, 553 U.S. 723, 743 (2008) ("Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." (citations omitted)); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 & n.5 (1970) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights

guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment.").

One *amicus* seizes on this difference to argue in favor of adopting a Privileges or Immunities Clause theory of incorporation, contending that the Excessive Fines Clause thereby protects only citizens. *See* Am. Civil Rights Union Amicus Br. 10–11. Accepting the invitation to reconsider Privileges or Immunities Clause doctrine would require the Court to confront whether and how the Bill of Rights protects *all* persons from unlawful state action.

Discarding the Court's current approach could raise other serious questions. Would the rules the Court has imposed against States and localities pursuant to other provisions of the Bill of Rights remain "clearly established" for the purpose of the Court's qualified immunity doctrine? *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017). Would these prior decisions remain "clearly established Federal law" for the purpose of federal habeas proceedings? *See* 28 U.S.C. § 2254(d)(1). These questions would require urgent answers, and the Court is in no position to provide them prior to a decision to reconsider the basis of incorporation. Such a change is not only unnecessary as a matter of doctrine, but is also irrelevant here.

The Court should continue to apply the standard it has "well established" over numerous cases, *McDonald*, 561 U.S. at 750, and ask whether a proportionality requirement for *in rem* forfeitures is a

"fundamental" and "deeply rooted" feature of our country's legal tradition, *id.* at 767.

II. History Shows That *In Rem* Forfeitures Were Not Originally Understood to Be Subject to an Excessive Fines Clause Proportionality Requirement

The historical evidence all points in a single direction: The right Timbs claims is neither fundamental to, nor deeply rooted in, America's legal tradition. Although *in rem* forfeitures have always existed in American law—and frequently have been harsh—from before the Revolution through most of the twentieth century, no court even suggested that a state or federal Excessive Fines Clause imposed a proportionality requirement on these forfeitures. Unchallenged practice is highly probative of the Constitution's original meaning, and it is particularly so here in light of the *other* constitutional challenges occasionally brought against *in rem* forfeitures, and in light of the application of the Excessive Fines Clause's proportionality requirement to *in personam* fines. Observers sometimes suggested that the Due Process Clause imposes limitations on *in rem* forfeitures—albeit limitations unrelated to proportionality—which makes it all the more striking that they did not identify any proportionality limitation stemming from the Excessive Fines Clause.

The historical understanding of *in rem* forfeitures both explains the silence regarding any Excessive Fines Clause limitation and further substantiates the

significance of this silence. American law has long distinguished *in rem* forfeitures from *in personam* fines; the former are *not* penalties, while the latter are. Because the Excessive Fines Clause applies only to penalties, it does not apply to *in rem* forfeitures. Moreover, any proportionality requirement would fundamentally contradict the longstanding rule that the guilty property of even an innocent owner can be the subject of *in rem* forfeiture, and would do nothing to further the original central purpose of the Excessive Fines Clause.

A. *In rem* forfeitures antedate constitutional ratification and have continued for more than two centuries

1. Authorities in England and America have brought *in rem* proceedings to forfeit property used to violate the law for well over three hundred years. *See C. J. Hendry Co. v. Moore*, 318 U.S. 133, 138 (1943). The English admiralty courts and the Court of Exchequer heard *in rem* proceedings against "articles seized . . . for the violation of law." *Id.* at 137. The Common Law "established [*in rem* procedures] . . . certainly as early as the latter part of the seventeenth century," and courts used *in rem* procedures to combat piracy, smuggling, and unlawful fishing. *Id.* at 137–39 & nn. 2–3 (collecting cases).

The American colonies adopted *in rem* procedures and used them in both admiralty and common law courts. *Id.* at 139. For example, the colonies adopted *in rem* forfeitures to enforce the Navigation Acts as

well as laws regulating imports and the sale and storage of commodities. *See id.* at 139–48 & nn.4–14 (collecting colonial statutes and cases). The procedure "had become a recognized part of the common law system as developed in England and received in this country long before the American Revolution." *Id.* at 149. The American States continued to employ *in rem* forfeitures after separating from Great Britain, both during the period of the Articles of Confederation and following the Constitution's ratification. *Id.* at 149–51.

The Constitution gave the federal government control "over the regulation of trade, navigation and customs duties which had been prolific sources of forfeiture proceedings in the state courts," *id.* at 152, and federal courts, therefore, heard many *in rem* forfeiture proceedings. Such proceedings persisted at the state level after the ratification of the Constitution as well. Antebellum state statutes imposed *in rem* forfeitures for violations of various state laws, including fishing, gambling, waterway, gunpowder, and alcohol regulations.[1]

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[1] *See, e.g., C. J. Hendry Co.*, 318 U.S. at 150 & n.15 (collecting cases regarding state fishing laws); *Davidson v. Blunt*, 16 Ky. 128, 128 (1811) (discussing 1799 Kentucky statute subjecting to *in rem* forfeiture "all money, or property, staked or betted"); *Scott v. Willson*, 3 N.H. 321, 321 (1825) (discussing 1809 New Hampshire statute subjecting to *in rem* forfeiture all un-rafted timber found in the Connecticut river); *Barnacoat v. Six Quarter Casks of Gunpowder*, 42 Mass. 225, 225 (1840) (describing 1833 Massachusetts law subjecting to *in rem* forfeiture gunpowder kept in violation of municipal regulations); *Talmage & Van Pelt v. Fire Dep't of New York*, 24 Wend. 235, 236 (N.Y. Sup. Ct. 1840) (de-

Federal and state use of *in rem* forfeitures continued during the Civil War and expanded into the twentieth century. For example, by the mid-nineteenth century federal revenue laws provided for the *in rem* forfeiture of any property held for the purpose of evading payment of applicable duties. *See* George Boutwell, *The Tax-Payer's Manual* 23–24 (1865); Rufus Waples, *Treatise on Proceedings In Rem* 215–16 (1882) (providing an extensive list of property forfeitable in an *in rem* proceeding under federal revenue laws), cited in *United States v. Bajakajian*, 524 U.S. 321, 330 (1998); Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 698 & n. 5 (3d ed. 1865) (collecting cases).[2] The use of *in rem* forfeitures to enforce state revenue laws was similarly extensive and

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scribing 1830 New York law subjecting to *in rem* forfeiture gunpowder held in quantities exceeding statutory limits); *Our House No. 2 v. State*, 4 Greene 172, 174 (Iowa 1853) (discussing Iowa statute providing for the *in rem* forfeiture of "dram shops").

[2] The third edition of Bishop's *Commentaries on the Criminal Law*, published in 1865, was the most recent edition circulating during the period of the Fourteenth Amendment's framing and ratification. The fourth edition of Bishop's treatise was published in 1868, the year the Fourteenth Amendment was ratified, and its discussion of *in rem* forfeitures is virtually identical to the third edition's. *See* Joel Prentiss Bishop, *Commentaries on the Criminal Law* §§ 694–709 (4th ed. 1868). Because the third edition offers the most direct evidence of the understanding of constitutional rights held by the Fourteenth Amendment's framers and ratifiers, all citations to Bishop in the main text refer to the third edition of his work. *Cf. McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (relying largely on pre-ratification evidence to conclude that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty").

well-established. *See Our House No. 2 v. State*, 4 Greene 172, 175 (Iowa 1853) ("[T]he revenue laws of every state in the union authorize proceedings in rem against the property alone, in the event of failure to pay taxes, and such laws are not considered unconstitutional."); *Megee v. Bierne*, 39 Pa. 50, 64 (1861) ("[T]he seizure and condemnation of the goods under the revenue laws was strictly a proceeding in rem."); *Makins Produce Co. v. Callison*, 67 Wash. 434, 439, (1912) ("A judgment . . . declaring the condemnation or forfeiture of goods seized for a breach of the excise or revenue laws, is strictly *in rem*." (quoting 2 *Black on Judgments*, § 799)).

Courts also employed *in rem* forfeitures to enforce alcohol regulations. In 1871, for example, the Massachusetts Supreme Judicial Court explained that "[t]he seizure of liquors . . . because they are kept for sale illegally, is a proceeding *in rem*," and observed that "[l]egislation of this character is not novel." *Commonwealth v. Certain Intoxicating Liquors*, 107 Mass. 396, 399 (1871). In 1890, one commentator observed that "[i]n all of the states, liquor that is intoxicating and kept for illegal sale, with the vessels containing it, is subject to seizure and condemnation." Henry Austin, *The Liquor Law in the United States* 123 (1890).

The latter half of the nineteenth century saw *in rem* forfeitures become especially important when revenue laws and alcohol regulation overlapped. Congress partially relied on excise taxes to fund the Civil War; after the war, it repealed most of the excise taxes, but kept taxes on distilled spirits and tobacco.

CRS Report R43189, *Federal Excise Taxes: An Introduction and General Analysis* 2–3 (2013). The excise taxes on spirts and tobacco continued to raise enormous sums: "In the decades after the Civil War, [they] accounted for between one-third and one-half of all federal revenue . . . [and] were the single largest source of internal revenue during this era." *Id.* at 3. The large amount of money at stake inevitably made smuggling *untaxed* alcohol highly profitable, and authorities often used *in rem* forfeitures to address the problem. *See, e.g.*, *Buchannan v. Biggs*, 2 Yeates 232, 233–34 (Pa. 1797); *Commonwealth v. Certain Intoxicating Liquors*, 107 Mass. 386, 396 (1871). One 1882 treatise, for example, justified the "rather severe" nature of tax-related *in rem* forfeitures by reference to the "difficulty of collecting government dues," a difficulty created by "the fact that in some parts of the country the distillery business has carried illicit whisky-making to that degree of refinement which is the poetry of crime. . . . 'Moonshiners' . . . are likely to afford material for many a tale by the future romancer." Waples, *supra*, § 149.

In rem forfeitures have continued into the present day, though authorities now focus on illicit drug traffickers rather than moonshiners.

2. Whether imposed by States or the federal government, *in rem* forfeitures have often produced draconian consequences for property owners. An 1819 federal statute, for example, limited the number of passengers a ship could carry to two-fifths its weight in tons, plus an additional twenty passengers; if it car-

ried more, the entire ship was liable to federal forfeiture. *See United States v. The Louisa Barbara*, 26 F. Cas. 1000, 1001 (E.D. Pa. 1833).

In the notable *The Louisa Barbara* case, the weight-limit law yielded the forfeiture of an enormously valuable, nearly four-hundred-ton vessel whose 178 passengers exceeded the limit by a single traveler. *Id.* The ship's owners pointed out that a large portion of the ship's passengers "were children, who paid nothing for their passage," and opposed forfeiture on statutory, not constitutional, grounds, arguing that the children could not "be considered or taken to be passengers within the intention of the law." *Id.* The court rejected this contention, holding that it had "no such power" to prevent the forfeiture, and that any such power rested with "that department of our government, which administers its liberality and mercy, and may forbear to execute the rigour of the law, where it is believed that its violation has been innocent or excusable." *Id.* at 1002; *see also Phile v. The Anna*, 1 Dall. 197, 207 (Pa. 1787) (upholding the *in rem* forfeiture of a ship in spite of the lack of evidence that its owners "meant to do any thing unfairly," because the law did "not speak of the knowledge of any person," and "if the policy of the Legislature seems to bear hard on the subject, we are not to judge, and determine upon its propriety").

The Louisa Barbara illustrates the harsh consequences that may result from the traditional rule that even the property of an innocent owner could be susceptible to *in rem* forfeiture. Notably, this rule is

among the most widely accepted and consistently applied in all of American law.

For instance, the Supreme Court of Pennsylvania endorsed the traditional innocent-owner rule even before the ratification of the Constitution, *id.*, and in 1818, Chief Justice Marshall, riding circuit, affirmed the rule in ordering the forfeiture of the *Little Charles* for its violation of an American embargo. *The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818). The ship's owner objected to the introduction of the captain's report, which showed that the vessel had illegally proceeded to a foreign port, on the ground that "in a criminal case, the declarations of the captain cannot affect the owner." *Id.* at 981. Chief Justice Marshall dismissed the objection, explaining that the case was "a proceeding against the vessel, for an offence committed by the vessel, which . . . does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner." *Id.* at 982.

In 1844, the Court reaffirmed the irrelevance of the owner's innocence to *in rem* forfeitures, holding that the owner's innocence cannot "withdraw the ship from the penalty of confiscation under the act of Congress." *The Malek Adhel*, 43 U.S. 210, 233 (1844). Considering the question settled by Chief Justice Marshall's decision in *The Little Charles*, the Court explained that the guilt of the "thing to which the forfeiture attaches" is determined "without any reference *whatsoever* to the character or conduct of the owner." *Id.* (emphasis added).

Courts did not limit the innocent-owner rule to forfeitures of ships. By 1844, courts had "familiarly applied [the doctrine] to cases of smuggling and other misconduct under our revenue laws . . . [and] other kindred cases, such as cases arising on embargo and non-intercourse acts," *id.* at 233–34, and cases soon arose applying it to *in rem* forfeitures of property on land, *see, e.g.*, *Our House No. 2*, 4 Greene at 172–73 (holding that an *in rem* forfeiture proceeding against a "dram shop" did not need to allege the owner's "knowledge of the unlawful traffic").

And in 1877, the Court enforced the doctrine against a distillery and its associated real estate, restating the rule announced in *The Little Charles* and *The Malek Adhel* and holding it irrelevant whether "the owner of the property should have knowledge that the lessee and distiller was committing fraud on the public revenue." *Dobbins' Distillery v. United States*, 96 U.S. 395, 399 (1877). Summarizing the previous century of case law, the Court observed that "[c]ases often arise where the property of the owner is forfeited . . . even when the owner is otherwise without fault . . . and it has always been held in such cases that the acts of the master and crew bind the interest of the owner of the ship, whether he be innocent or guilty." *Id.* at 401; *see also* Waples, *supra*, § 140 ("The owner may be perfectly innocent of any offense, yet his property may be guilty."). In sum, "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

Courts were well aware, of course, that the innocent-owner doctrine could seem technical and "may appear to be harsh." *United States v. Two Barrels of Whisky*, 96 F. 479, 480 (4th Cir. 1899), *overruled on other grounds in part by United States v. One Saxon Auto.*, 257 F. 251 (4th Cir. 1919). But they recognized that they had no power to "refuse to carry [it] into effect, or allow [themselves] to be controlled by consideration of the supposed or real hardship of these enactments, nor open the door to opportunities of perpetual evasion." *Id.* The rule was simply "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." *J. W. Goldsmith, Jr., Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (collecting cases); *see also One Saxon Auto.*, 257 F. at 254–55 (collecting cases). It has thus remained in force throughout the twentieth century up to the present day. *See Bennis v. Michigan*, 516 U.S. 442, 446 (1996) ("[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."); *United States v. Funds in the Amount of $100,120*, 901 F.3d 758, 768 (7th Cir. 2018).

3. Although *in rem* forfeitures have frequently arisen in a variety of contexts since the beginning of American history, prior to the late twentieth century not a single court held them limited by a state or federal Excessive Fines Clause, and the five state courts to consider the argument dismissed it. Because every State has a constitutional provision limiting the excessiveness of fines, litigants had every opportunity to

argue that Excessive Fines Clauses impose a proportionality requirement on *in rem* forfeitures, and the high stakes of forfeiture cases gave them every reason to do so. Indeed, given their acknowledgement of *in rem* forfeitures' harsh effects, *courts* had every reason to discuss the argument that the Clause might limit such forfeitures. The dearth of any such discussion in the case reports is therefore powerful evidence that the American legal tradition did not understand the Excessive Fines Clause to impose any proportionality requirement on *in rem* forfeitures.

Even before the adoption of the Fourteenth Amendment, litigants had many opportunities to raise federal Excessive Fines Clause challenges to federal *in rem* forfeitures and to raise state Excessive Fines Clause challenges to analogous state forfeitures. As demonstrated by the citations collected in the accompanying appendix, from the Revolution onward, nearly every constitution adopted by a State included an Excessive Fines Clause. And today, *every* State in the Union has a state constitutional provision prohibiting the imposition of excessive fines. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 876–77 & n.177 (2013) (explaining that forty-seven States have clauses prohibiting "excessive fines" and that the remaining three States have clauses either requiring proportionality for penalties or prohibiting excessive punishments generally). Courts regularly enforced state Excessive Fines Clauses—against *in personam* penalties—through the nineteenth and into the twentieth

century.[3] And, as the cases discussed above demonstrate, surely many *in rem* forfeitures arguably imposed "disproportionate" losses on owners.

The 1920 decision in *House and Lot v. State* was the first to suggest that the federal Excessive Fines Clause or a state equivalent imposes a proportionality limitation on *in rem* forfeitures. 204 Ala. 108 (1920). The case involved a challenge to a state law providing for the *in rem* forfeiture of "all property used in connection with [a distillery], together with the buildings and lots or parcels of ground constituting the premises." *Id.* at 109. The Alabama Supreme Court rejected the argument that any proportionality requirement applied to the *in rem* forfeiture, holding that Magna Carta's prohibition on disproportionate amercements and the State's constitutional prohibition on "excessive fines" had "*nothing to do with the case, for they relate to legislative punishment,*"

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[3] *See, e.g., Commonwealth v. Hitchings*, 71 Mass. 482, 486 (1855); *Blydenburgh v. Miles*, 39 Conn. 484, 490 (1872); *Wright v. Commonwealth*, 77 Pa. 470 (1875) (per curiam); *State v. Driver*, 78 N.C. 423, 429 (1878); *Conley v. State*, 85 Ga. 348 (Ga. 1890); *Southern Express Co. v. Commonwealth ex rel. Walker*, 92 Va. 59 (1895); *Ex parte Keeler*, 45 S.C. 537 (1896); *People v. Crotty*, 22 A.D. 77, 79 (N.Y. App. Div. 1897); *State v. Foster*, 22 R.I. 163 (1900); *State v. Griffin*, 84 N.J.L. 429, 432 (N.J. 1913); *Apple v. State*, 190 Md. 661, 668 (Md. Ct. App. 1948); *Peters v. University of N.H.*, 112 N.H. 120, 121 (1972). Notably, state Excessive Fines Clauses were not applied to *in rem* forfeitures until after this Court's decision in *Austin*, if ever. *See, e.g., In re King Properties*, 535 Pa. 321, 330–31 (1993); *State v. Williams*, 286 N.J. Super. 507 (N.J. Super. Ct. Law Div. 1995); *Evans v. State*, 214 Ga. App. 844, 846 (1994); *Aravanis v. Somerset*, 339 Md. 644, 664–65 (1995); *Medlock v. One 1985 Jeep Cherokee*, 322 S.C. 127, 132 (1996).

whereas the statute "is justified on the ground that it is a provision for the abatement of nuisances." *Id.*

No contemporaneous decisions disagreed with *House and Lot*. The first edition of the American Jurisprudence volume on forfeitures cited *House and Lot* for the proposition that "[s]tatutes which provide for the forfeiture of property used in connection with the violation of certain laws do not violate the constitutional provisions against cruel and unusual punishment." Am. Jur. 1 Forfeitures and Penalties § 3 (1939). And four state courts later came to the same conclusion, holding that their respective state Excessive Fines Clauses do not apply to *in rem* forfeitures. *See State v. Thornson*, 170 Minn. 349, 352–53 (1927) (citing and agreeing with *House and Lot*); *Moore v. Commonwealth*, 293 Ky. 55 (1943) (same); *Commonwealth v. One 1970, 2 Dr. H. T. Lincoln Auto.*, 212 Va. 597, 599 (1972) ("[The Constitution prohibits] the imposition of excessive bail or fines or infliction of unusual punishment. The forfeiture of offending property does not fall within any of these categories."); *Henry v. Alquist*, 127 A.D.2d 60, 65 (N.Y. App. Div. 1987) ("To the extent that the trial court's determination may be interpreted as a holding that the forfeiture . . . would violate the State and Federal constitutional proscriptions against cruel and unusual punishment . . . we find it to be in error.").

Beyond these state-court decisions rejecting application of state Excessive Fines Clauses to *in rem* forfeitures, no federal court even *mentioned* the possibility that the federal Excessive Fines Clause might im-

pose a proportionality requirement on *in rem* forfeitures until the Ninth Circuit's 1988 decision in *United States v. Tax Lot 1500*, 861 F.2d 232 (9th Cir. 1988), issued only five years before *Austin v. United States*, 509 U.S. 602 (1993). And the Ninth Circuit observed that it could find "no case holding the eighth amendment applicable to civil forfeiture actions." 861 F.2d at 233.[4] It therefore rejected the argument that the Excessive Fines Clause imposes a proportionality requirement against *in rem* forfeitures. *Id.* at 235.

Shortly after the Ninth Circuit's decision in *Tax Lot 1500*, the Third and Fourth Circuits also held that the Eighth Amendment does not apply to *in rem* forfeitures. *See United States v. 107.9 Acre Parcel of Land*, 898 F.3d 396, 400–01 (3rd Cir. 1990); *United States v. Santoro*, 866 F.2d 1538, 1543–44 (4th Cir. 1989). Around the same time, however, three separate concurrences suggested, without any explanation, that the Excessive Fines Clause may impose some proportionality requirement on *in rem* forfeitures. *See United States v. 3639-2nd St., N.E.*, 869

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[4] The Second Circuit's decision in *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), comes close to making this suggestion, but it rejected an Eighth Amendment challenge to an *in personam* forfeiture. *Id.* at 396–97. In doing so, it observed that *in rem* forfeitures "have been upheld even where . . . the effect is to deprive an owner of property where that owner is not the person guilty," and that "[a]t least for this purpose, there is no substantial difference between an *in rem* proceeding and a forfeiture proceeding brought directly against the owner." *Id.* Far from suggesting that the Eighth Amendment can invalidate *in rem* forfeitures, this reasoning points to the opposite conclusion. *Accord United States v. Grande*, 620 F.2d 1026 (4th Cir. 1980); *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987).

F.2d 1093, 1098 (8th Cir. 1989) (Arnold, J., concurring); *United States v. On Leong Chinese Merchants Ass'n Bldg.*, 918 F.2d 1289, 1298–99 (7th Cir. 1990) (Cudahy, J., concurring); *United States v. 916 Douglas Ave.*, 903 F.2d 490, 495 (7th Cir. 1990) (Flaum, J., concurring).

Finally, in 1992 the Second Circuit became the first court to accept the argument the Ninth Circuit had rejected in *Tax Lot 1500*, applying the Excessive Fines Clause against an *in rem* forfeiture of a condominium that had been used to traffic a small amount of drugs. *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 32 (2d Cir. 1992); *see also United States v. Premises Known as RR No. 1 Box 224*, 14 F.3d 864, 873 (3d Cir. 1994) ("Prior to *Austin*, the United States Court of Appeals for the Second Circuit was the only court of appeals to hold that the Eighth Amendment potentially limited civil forfeitures."). The Second Circuit ultimately rejected the Excessive Fines Clause challenge, however, concluding that the forfeiture was not "'grossly disproportionate' to the crime committed." *38 Whalers Cove Drive*, 954 F.2d at 38 (quoting *Solem v. Helm*, 463 U.S. 277, 290–92 (1983)). Two months later, the Eighth Circuit "adopt[ed] the Ninth Circuit's analysis" and held that the Excessive Fines Clause does *not* apply to *in rem* forfeitures, *United States v. 508 Depot St.*, 964 F.2d 814, 817 (8th Cir. 1992)—a holding this Court then reversed in *Austin*.

4. That no court applied a state or federal Excessive Fines Clause to *in rem* forfeitures until *1992*—more than two hundred years after the Constitution's ratification—strongly implies that no one understood

the Excessive Fines Clause to impose a proportionality requirement on these forfeitures. And that owners of forfeited property raised *other* constitutional challenges against *in rem* forfeitures—albeit unsuccessfully—further bolsters the power of this implication. Bishop's 1865 treatise observed that while it is possible that *in rem* forfeitures "may be restrained by the constitution of the State . . . our constitutions have few if any direct restrictions in the matter; those which exist resulting from provisions introduced with a primary regard to other objects, if indeed any exist." Bishop, *supra*, § 707.

The very existence of other constitutional challenges to *in rem* forfeitures indicates that the absence of Excessive Fines Clause objections resulted from the widespread understanding that the Clause simply did not apply (rather than lack of opportunities). Litigants occasionally argued, for example, that *in rem* proceedings violated the owner's right to a jury trial (objections that courts generally rejected). *See, e.g.*, *United States v. La Vengeance*, 3 U.S. 297, 301, (1796) ("It is a process of the nature of a libel *in rem*; and does not, in any degree, touch the person of the offender. In this view of the subject, it follows, of course, that no jury was necessary."); *Lincoln v. Smith*, 27 Vt. 328, 362–63 (1855) (rejecting jury-trial challenge to *in rem* forfeiture proceedings); *Jones v. Root*, 72 Mass. 435, 438–39 (1856) (same); *Dowda v. State*, 203 Ala. 441, 443 (1919) (same).

Similarly, property owners occasionally subjected the innocent-owner doctrine to due process objections (again, unsuccessfully). For example, a claimant

raised such a challenge against a mid-nineteenth century Iowa law that provided for the *in rem* forfeiture of "dram shops," without requiring proof of the owner's "knowledge of the unlawful traffic." *Our House No. 2*, 4 Greene at 172–73. Rejecting the challenge, the Iowa Supreme Court explained that "[u]nder our federal, as well as under state constitutions, it is not uncommon to pass laws declaring articles to be forfeited, when they are used for illegal or criminal purposes . . . Still the constitutionality of those acts *have never been questioned*." *Id.* at 174–75 (emphasis added). The constitutionality of *in rem* proceedings had been "conclusively settled by the highest judicial tribunal in our country . . . [T]he revenue laws of every state in the union authorize proceedings *in rem* against the property alone, in the event of failure to pay taxes, and such laws are not considered unconstitutional." *Id.* at 175. The Iowa Supreme Court concluded, "[t]his proceeding . . . does not deprive a person of his property without due process of law." *Id.*

Subsequent decisions reiterated this view. *See, e.g.*, *Van Oster v. Kansas*, 272 U.S. 465, 468 (1926) ("It has long been settled that statutory forfeitures of property intrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment."); *Logan v. United States*, 260 F. 746, 748–49 (5th Cir. 1919) ("The long history of forfeitures in this country, for violation of internal revenue and customs laws, of property, regardless of ownership, whether innocent or guilty, repels the idea that such forfeitures conflict with the owner's right to due process of law.").

Not only case reports, but also the Congressional record, demonstrate the nineteenth century understanding that the Excessive Fines Clause does not apply to *in rem* forfeitures. In the debate over the Confiscation Act of 1862, which authorized *in rem* forfeiture of rebel-owned property, critics argued that the Act violated "all of the provisions of the Fifth, Sixth, and Seventh Amendments," but the record of the debate contains few mentions of "the excessive-fines provision of the Eighth." Christopher Green, *Our Bipartisan Due Process Clause*, Geo. Mason L. Rev. (Forthcoming) 13, https://ssrn.com/abstract=3249845; *see also id.* at 46 n.248 (noting that "[a] couple of congressmen made passing references to the Excessive Fines Clause in their complaints about confiscation proposals in 1862"). Most of the Act's critics focused on due process objections to the Act. And among the criticisms that claimed the Act was too harsh, the vast majority were explicitly based on policy or morality, *not* the Constitution. *Id.* at 46–50. The relative absence of Excessive Fines Clause arguments implies that members of Congress simply did not think the Clause relevant to the Confiscation Act's *in rem* forfeitures.

Amidst other constitutional challenges to *in rem* forfeitures, the absence of any historical application of a proportionality requirement suggests that the American legal order did not understand the Excessive Fines Clause to establish one. If such an understanding existed, surely *some* litigant would have raised it and some court would have at least mentioned it.

5. Inferring contextual limits on constitutional rights from a longstanding and uninterrupted historical practice has a long pedigree in constitutional interpretation. "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991) (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988)); *see also Origet v. Hedden*, 155 U.S. 228, 238 (1894) (holding that the practice of charging administrative officials with determining dutiable value of imported articles was "open to no constitutional objection" because it dated to "the earliest history of the government."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–328 (1936) (observing that evidence of a longstanding legislative practice "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice"). Indeed, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, the Court refused to subject a punitive-damages award to scrutiny under the Excessive Fines Clause because the practice of awarding such damages "was well recognized at the time the Framers produced the Eighth Amendment." 492 U.S. 257, 274 (1989).

The historical absence of any judicial recognition of the constitutional right Timbs claims is especially powerful here because—unlike, for example, the constitutional prohibition on laws requiring racial segregation—no political considerations would lead litigants or judges systematically to ignore the right Timbs asserts. Continued enforcement of racial segre-

gation even after adoption of the Fourteenth Amendment does not imply that ratifiers understood racial segregation to be constitutional; fear of negative political repercussions and even violent retaliation easily explain why courts refused to invalidate it. Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. Rev. 1283, 1385–86 (2000). Here, however, no similar collateral concerns would explain courts' failure to impose a proportionality requirement on *in rem* forfeitures, which could be imposed on anyone, not just members of a politically disfavored group. Besides, political considerations did not prevent courts from imposing a proportionality requirement on *in personam* penalties. *See supra*, n.4. And unlike the numerous constitutional arguments Radical Republicans made against racial segregation, *see, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 984–1005 (1995), the second half of the nineteenth century saw virtually no lawyer, scholar, or court argue that the Excessive Fines Clause applies to *in rem* forfeitures.

At bottom, Timbs's argument for incorporation maintains that the forfeiture of his Rover violates the Due Process Clause. But the Court has held that "[i]f the government chooses to follow a historically approved procedure, it necessarily *provides* due process." *Pac. Mut. Life Ins. Co.*, 499 U.S. at 31.

B. The historical rationale for *in rem* forfeitures explains why they were not understood to be subject to a proportionality requirement

The long-established understanding of *in rem* forfeitures explains why the Excessive Fines Clause does not apply here. As multiple nineteenth-century treatises explicated, *in rem* forfeitures are not penalties, and the Excessive Fines Clause applies only to a "*punishment* for some offense," *Austin*, 509 U.S. at 610 (quoting *Browning-Ferris*, 492 U.S. at 265). Practical considerations also explain why *in rem* forfeitures would not have been understood to be subject to a proportionality requirement: The doctrine establishing the irrelevance of the property owner's innocence is flatly inconsistent with such a requirement, and *in rem* forfeitures by definition will never result in an individual's incarceration, which means they do not implicate the traditional concern behind the Excessive Fines Clause. The Court cannot reconcile the theory and practice of *in rem* forfeitures with any proportionality test.

1. Because courts have long understood *in rem* proceedings as actions against *property*, the American legal tradition has not considered *in rem* forfeitures—unlike *in personam* fines or forfeitures—as "punishments" to which the Excessive Fines Clause applies.

The distinction between *in rem* forfeitures and *in personam* fines antedates even the colonies' separation from Great Britain. A treatise by Sir Jeffrey Gilbert, renowned legal scholar and Lord Chief Baron of

the Court of Exchequer, explains, for example, that "the *Forfeiture* was appointed *in rem, and* likewise a Penalty was laid upon the Person transgressing the Law." Sir Jeffrey Gilbert, *A Treatise on the Court of Exchequer* 181 (1758) (last emphasis added; spelling modernized). Courts enforced the forfeiture in an *in rem* proceeding and enforced the "Penalty" via a "Personal Information," and owners often avoided the "Penalty" by declining to contest the forfeiture. *Id.*

Just a few decades after the Constitution's ratification, the Court issued what remains the most-cited decision regarding the distinction between *in rem* and *in personam* proceedings, *The Palmyra*, 12 Wheat. 1 (1827). Writing for the Court, Justice Story explained that while *in personam* forfeitures could not be imposed without a judgment of conviction, "this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*." *Id.* at 14. A judgment of conviction is unnecessary for an *in rem* forfeiture because "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing." *Id.* Justice Story observed that there are "[m]any cases" featuring an *in rem* forfeiture but no *in personam* penalty and "[m]any cases" where both arise. *Id.* But either way "the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." *Id.* at 15; *see also Talmage & Van Pelt v. Fire Dep't of New York*, 24 Wend. 235, 236 (N.Y. Sup. Ct. 1840) (explaining that a New York law imposing fines and forfeitures for storing too much gunpowder imposed "two forfeitures . . . [t]he

pecuniary penalty must, of course, be recovered by action; but the mode of asserting the other forfeiture, is by seizing the property and storing it in a magazine").

Reflecting the consensus in the case law, treatises written in the years leading up to the Civil War routinely emphasized the distinction between *in rem* and *in personam* forfeitures. Erastus Benedict's antebellum admiralty treatise, for example, explained that "[s]uits and proceedings in Admiralty are divided into two great classes—suits and proceedings *in rem*, and suits and proceedings *in personam*." Erastus Benedict, *The American Admiralty* § 359 (1850). *In rem* proceedings "are against a thing itself, and the relief sought is confined to the thing itself," while *in personam* proceedings "are against a person, and the relief is sought against him without reference to any specific property or thing." *Id.* The former sort of proceedings are never criminal, while the latter can be. *Id.* § 360.

Widely respected treatises published during and shortly after the Civil War—close in time to the ratification of the Fourteenth Amendment—reflected the conceptual distinction. Judge Conkling, whose treatise was "a work long used with approbation by the profession," *Gaines v. Fuentes*, 92 U.S. 10, 24 (1875) (Bradley, J., dissenting), underscored that an *in rem* proceeding "is strictly a prosecution against a *thing*, which has been seized as forfeited . . . on account of some imputed illegal act in regard to it. No inquiry is instituted . . . concerning [its] ownership," Alfred Conkling, *Treatise on the Organization, Jurisdiction,*

and Practice of the Courts of the United States 540–41 (1864).

Moreover, Bishop's 1865 treatise—"prominent" among the profession, *Austin*, 509 U.S. at 626—similarly explains that while an *in personam* forfeiture is "inflicted as a punishment for crime," Bishop, *supra*, § 701, an *in rem* forfeiture "is neither a punishment for crime . . . nor a damage awarded for a civil injury," *id.* § 702. An *in rem* forfeiture thus "differs from a mulct, or fine" as well as "those forfeitures which in the English law attend corruption of blood." *Id.* § 697. An *in rem* forfeiture proceeds upon its own logic: "Law is the creator of property; and the province of a creator is to prescribe to the thing created the conditions of its being. When the conditions are violated, the property falls." *Id.* § 696.

The distinction between *in rem* and *in personam* proceedings remains in force today, as the Court has consistently reaffirmed. *See, e.g., United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984) ("In contrast to the *in personam* nature of criminal actions, actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object."); *United States v. Ursery*, 518 U.S. 267, 278 (1996) ("*In rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines."); 4A Charles Alan Wright & Arthur Miller, *Fed. Prac. & Proc. Civ.* § 1070 (4th ed.) ("[I]t still is important to distinguish actions based on property from those based on personal jurisdiction because of their different legal consequences.").

In rem forfeitures are not punishments because "the only effect is the immediate change of *status*: that is, the property changes owners." Waples, *supra*, § 140. Accordingly, courts and commentators have understood *in rem* forfeitures not to be subject to the Excessive Fines Clause, which has always applied only to "punishments." "[A]t the time of the drafting and ratification of the Amendment, the word 'fine' was understood to mean a payment to a sovereign as *punishment* for some offense." *Browning-Ferris*, 492 U.S. at 265 (emphasis added).

2. In addition to this conceptual problem, on a practical level there is no way to reconcile a proportionality requirement with the traditional practice of *in rem* forfeitures.

First, courts have long imposed *in rem* forfeitures against the property of owners who have no awareness of or involvement in the activity that justifies the forfeitures. Subjecting such forfeitures to a "proportionality" analysis is inconsistent with the innocent-owner rule: Leasing a yacht to an individual who later uses it to transport marijuana—even when the decision is taken without knowledge of the lessee's intended use—is plainly not "proportionate" with punishing the owner with a loss equivalent to the value of the yacht. *See Calero-Toledo*, 416 U.S. at 665–68. The innocent-owner rule is justified by the long-held view that the forfeiture is not punishment at all. "If the constitution allows *in rem* forfeiture to be visited upon innocent owners who were imprudent in choosing bailees, the constitution hardly requires proportional-

ity review of forfeitures imposed on the guilty who assumed the risk of forfeiture." *Tax Lot 1500*, 861 F.2d at 234; *accord 508 Depot St.*, 964 F.2d at 817.

Second, unlike *in personam* penalties, *in rem* forfeitures *cannot* deprive individuals of their liberty, and for this reason they are as a practical matter unrelated to the central original concern of the Excessive Fines Clause, which was to prevent judges from incarcerating individuals on the basis of unpayable discretionary fines. Similar provisions of Magna Carta and the 1689 English Bill of Rights inspired the Excessive Fines Clause, and the arguments made during a significant early case involving these provisions, *The Case of William Earl of Devonshire*, 11 How. St. Tr. 1353 (Parl. 1689), indicate that the provisions' "critical purpose" was to prevent discretionary, unpayable fines from becoming a tool for incarcerating political enemies. Eighth Amendment Scholars Amicus Br. 20. "'[I]f the Judges may commit the Party to Prison till the Fine be paid, and withal set so great a Fine as is impossible for the Party to pay into Court, then it will depend upon the Judges pleasure, whether he shall ever have his *Liberty*.'" *Id.* (quoting *The Works of the Right Honourable Henry late L. Delamer[e], and Earl of Warrington* 576 (1694)); *see also Browning-Ferris*, 492 U.S. at 267 (noting that the Excessive Fines Clause in the 1689 English Bill of Rights was motivated by the experience of "some opponents of the King [who] were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed").

Unlike *in personam* fines, an *in rem* forfeiture by definition targets property *already* seized. An *in rem* proceeding therefore does not permit the government to obtain additional exactions. If the property's owner chooses not to appear in the proceeding, the worst possible consequence is a judgment of forfeiture. *See, e.g.*, Gilbert, *supra*, at 180; Ind. Code § 34-24-1-3(e). Because *in rem* forfeitures do not implicate the core concern of the Excessive Fines Clause, it is unsurprising no one understood the Clause to apply to them.

III. History Establishes That Either the Excessive Fines Clause Does Not Apply to *In Rem* Forfeitures or the Fourteenth Amendment Does Not Incorporate the Clause Against the States

The historical evidence thus establishes that from before the American Revolution, through the Civil War and the ratification of the Fourteenth Amendment, and up to the end of the twentieth century, the American legal tradition did *not* understand *in rem* forfeitures to be subject to any proportionality requirement. Only two possible interpretations of the Excessive Fines Clause and the Fourteenth Amendment comport with this longstanding and widespread understanding. The more compelling interpretation is that the Excessive Fines Clause does *not* apply to *in rem* forfeitures: This interpretation fully explains the history and the Court need not extend *Austin* so as to interfere with it. But if the Court were to conclude that *Austin already* requires applying the Excessive Fines Clause to *in rem* forfeitures, the history recounted above precludes interpreting the Fourteenth

Amendment to incorporate the Excessive Fines Clause. Either way, the historical evidence squarely forecloses any constitutional interpretation requiring proportionality for the *in rem* forfeiture Timbs challenges here.

A. The better interpretation reads the Excessive Fines Clause not to apply to *in rem* forfeitures

The Court can best resolve this case by interpreting the Excessive Fines Clause not to apply to *in rem* forfeitures. This interpretation would reconcile all of the relevant historical evidence, including the evidence Timbs identifies, and would be consistent with the Court's current Excessive Fines Clause jurisprudence. Although the Court's decision in *Austin* applied the Excessive Fines Clause to *federal in rem* forfeitures, *Austin* said nothing about *state* forfeitures; because a proportionality requirement applied to *in rem* forfeitures is neither "fundamental to" nor "deeply rooted in" America's legal tradition, there is no reason to expand *Austin*'s holding to States. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). And regardless, the Court's subsequent decisions have fatally undermined the reasoning on which *Austin* relied.

1. From the very beginning, every State and the federal government has imposed *in rem* forfeitures on the instrumentalities of crimes, even while state or federal constitutional provisions prohibiting excessive fines have restrained virtually all of these gov-

ernments. *In rem* forfeitures were often harsh, and litigants sometimes challenged them on constitutional grounds. Yet—even after the Fourteenth Amendment's ratification—*no* court applied a state or federal Excessive Fines Clause to *in rem* forfeitures until the late twentieth century. And the five earlier state-court decisions to address the question specifically *rejected* application of a constitutional prohibition on excessive fines to *in rem* forfeitures. *House and Lot v. State*, 204 Ala. 108 (1920); *State v. Thornson*, 170 Minn. 349, 352–53 (1927); *Moore v. Commonwealth*, 293 Ky. 55 (1943); *Commonwealth v. One 1970, 2 Dr. H. T. Lincoln Auto.*, 212 Va. 597, 599 (1972); *Henry v. Alquist*, 127 A.D.2d 60, 65 (N.Y. App. Div. 1987).

The obvious explanation for the historical silence surrounding Excessive Fines Clause limitations on *in rem* forfeitures is that America's lawyers and judges have not understood the federal Excessive Fines Clause—or its state analogues—to apply to these forfeitures. The Clause applies only to punishments, and—as decades of cases and treatises have explained—*in rem* forfeitures are *not* punishments.

Notably, this interpretation not only explains the lack of any Excessive Fines Clause objection to *in rem* forfeitures, but it also reconciles all of the historical evidence Timbs has marshalled. Again, the Excessive Fines Clause has antecedents in Magna Carta and the 1689 English Bill of Rights, and every state constitution includes some version of its proportionality principle. *See* Pet. Br. 10–19. Yet courts have historically enforced state and federal Excessive Fines Clauses only against *in personam* penalties. *See supra*, n.3.

Understanding the Excessive Fines Clause to apply only to *in personam* penalties explains that historical practice.

2. The Court's decision in *Austin* does not require the Court to interpret the Excessive Fines Clause to apply to state *in rem* forfeitures. In *Austin*, the Court "limited [its] review to the question 'whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. §§ 881(a)(4) and (a)(7)," two provisions of a *federal* forfeiture statute. *United States v. Ursery*, 518 U.S. 267, 281 (1996). *Austin* held only that the Excessive Fines Clause applies to *in rem* forfeitures under these two specific provisions. *Austin v. United States*, 509 U.S. 602, 604–05 & n.1 (1993). The Court need not—and plainly, in light of the historical record explored above, *should* not—extend this holding to *state in rem* forfeitures.

More important, the Court's subsequent decisions have undermined *Austin*'s reasoning. *Austin* began from the presumption that "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Id.* at 609–10 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. U.S. 257, 265 (1989)). It thus framed the question as whether a forfeiture under the federal statutes at issue "is *punishment*." *Id.* at 610 (emphasis added). And in answering this question, the Court relied heavily on its decision in *United States v. Halper*, 490 U.S.

435 (1989), which addressed when the Double Jeopardy Clause prohibits a second punishment for the same offense.

Austin quotes *Halper*'s definition of "punishment," the term on which *Austin*'s entire analysis turns: "[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is *punishment*, as we have come to understand the term." *Austin*, 509 U.S. at 621 (quoting *Halper*, 490 U.S. at 448) (second emphasis added); *see also id.* at 610 (same); *United States v. Premises Known as RR No. 1 Box 224*, 14 F.3d 864, 873 (3d Cir. 1994) ("In *Austin*, the Supreme Court relied on *United States v. Halper* and *Browning Ferris Industries v. Kelco Disposal, Inc.* in reaching its conclusion that the civil forfeiture statutes constitute a 'punishment.'" (citations omitted)). *Austin* held that the challenged forfeitures qualified as punishment—and therefore were subject to the Excessive Fines Clause—because "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence." *Austin*, 509 U.S. at 622 n.14.

Austin thus made *Halper*'s definition of "punishment" the foundation of its conclusion, but the Court soon demolished this foundation. Three years after *Austin*, the Court explicitly "limited [*Halper*] to the context of civil penalties," *Ursery*, 518 U.S. at 282, and held that a *civil forfeiture* proceeding results in a "punishment" for the purposes of the Double Jeopardy Clause only if it is "so punitive in fact as to persuade us that [it] may not legitimately be viewed as civil in

nature," *id.* at 288 (internal quotation marks and citation omitted).

Ursery refused to apply *Halper*'s definition of punishment to *in rem* forfeitures because it recognized that the Court has long drawn "a sharp distinction between *in rem* civil forfeitures and *in personam* civil fines: Though the latter could, in some circumstances, be punitive, the former could not." *Id.* at 275. *Ursery* explained that it is nonsensical to apply any sort of proportionality test to *in rem* forfeitures: It makes no sense to "compare the harm suffered by the Government against the size of the penalty imposed" because *in rem* forfeitures, "in contrast to civil penalties, are designed to do more than simply compensate the Government . . . Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture." *Id.* at 284.

In explaining why *Austin* did not overrule *Halper*, *Ursery* suggested that *Austin* and *Halper* were unconnected, *id.* at 286, which, alas, completely ignores *Austin*'s reasoning. *Ursery* correctly observed that *Halper* used a "case-by-case approach," while *Austin* employed "a categorical approach" whereby the Excessive Fines Clause would apply depending on the statutory authority for, rather than factual circumstances of, the forfeiture. *Id.* at 287; *see also Austin*, 509 U.S. at 622 n.14. But the difference in the way the two decisions *applied* the definition of "punishment" does not decouple their *rationales*. *Austin* quoted *Halper* four times to support the expansive definition

of "punishment" it employed to subject forfeitures under two federal forfeiture provisions to the Excessive Fines Clause; *Austin* held that these forfeiture provisions imposed punishments because they "'cannot fairly be said *solely* to serve a remedial purpose,'" even if they "serve *some* remedial purpose." *Id.* 621 (quoting *Halper*, 490 U.S. at 448).

The Court's criticisms of *Halper* culminated in *Hudson v. United States*, where it directly overruled *Halper*, concluding that the decision's "test for determining whether a particular sanction is 'punitive,' and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable." 522 U.S. 93, 102 (1997). The Double Jeopardy Clause thus no longer applies to "punitive" civil penalties but "protects only against the imposition of multiple criminal punishments for the same offense." *Id.* at 99.

The Court's Double Jeopardy Clause opinions in *Ursery* and *Hudson* undermine *Austin*'s reliance on *Halper*, and the decision in *United States v. Bajakajian*, 524 U.S. 321 (1998), vitiates any remaining support for *Austin*'s reasoning. In *Bajakajian*, the Court confronted an Excessive Fines Clause challenge to an *in personam* forfeiture imposed as part of a criminal sentence for a federal currency-reporting violation. *Id.* at 325. Because the forfeiture was "imposed at the culmination of a criminal proceeding and require[d] conviction of an underlying felony," the Court had "little trouble concluding that . . . [it] constitute[d] punishment." *Id.* at 328. Notably, the Court distinguished this *in personam* forfeiture from "traditional

civil *in rem* forfeitures," which it said "were historically considered nonpunitive." *Id.* at 330.

The Court surveyed its early decisions involving *in rem* forfeitures and observed that each recognized that "[t]he theory behind such forfeitures was the fiction that the action was directed against 'guilty property,' rather than against the offender himself," which implied that "the owner of forfeited property could be entirely innocent of any crime." *Id.* Accordingly, "[t]raditional *in rem* forfeitures were thus not considered punishment against the individual for an offense." *Id.* at 331. And "[b]ecause they were viewed as nonpunitive, *such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause.*" *Id.* (emphasis added) (observing that in *Usery* the Court "[r]ecogniz[ed] the nonpunitive character of such proceedings").

The Court's statement in *Bajakajian* that *in rem* forfeitures historically have not constituted punishments unequivocally contradicts *Austin*'s assertion that "forfeiture proceedings historically have been understood as imposing punishment despite their *in rem* nature." 509 U.S. at 616 n.9.

3. *Austin*'s unsupported statement that *in rem* forfeitures impose punishment is no reason to ignore the historical evidence that the Excessive Fines Clause has nothing to do with *in rem* forfeitures.

Austin first claimed that eighteenth-century dictionaries "confirm that 'fine' was understood to in-

clude 'forfeiture' and vice versa." *Id.* at 614 n.7. Although "forfeiture" and "fine" were *sometimes* used interchangeably, *see* Eighth Amendment Scholars Amicus Br. 32–33, the word "fine" was also used in a "restricted and technical sense" to mean "only those pecuniary punishments of offences, which are inflicted by sentence of a court in the exercise of criminal jurisdiction," *Hanscomb v. Russell*, 77 Mass. 373, 374–75 (1858); *see also* Eighth Amendment Scholars Amicus Br. 33 (noting *Hanscomb*).

More fundamentally, treating "fine" and "forfeiture" as synonyms ignores the crucial distinction between *in personam* and *in rem* forfeitures. Bishop's 1865 treatise clarified that an *in rem* forfeiture "differs from some other things in the law, known by the same name," such as "a mulct, or fine, whereby, under sentence of the court . . . a specific article of property . . . is transferred to the government." Bishop, *supra*, § 697; *see also id.* § 701 ("[F]orfeiture is sometimes inflicted as a punishment for crime," and this forfeiture "differ[s] in nature from the forfeiture discussed in this chapter [entitled 'where the thing, as distinguished from its owner, is in the wrong'].").
Bishop notes that a later section of his treatise mentions these other fines. *Id.* § 701. This later section in turn explains that statutes sometimes require the forfeiture of "particular articles of property," and "such forfeitures . . . rest on the same reasons as fines." *Id.* § 723. It also reiterates the distinction between *in personam* forfeitures and *in rem* forfeitures: The latter "restrain men from making injurious uses of their property," and are "not to be regarded as punishments." *Id.*

Austin also suggested that *in rem* forfeitures are punishments because the Court has "expressly reserved the question whether [an *in rem* forfeiture could] forfeit the property of a truly innocent owner." 509 U.S. at 617. *Austin* inferred that if *in rem* forfeitures "had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner . . . it is only on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense." *Id.*

Austin's inference is mistaken. An *in rem* forfeiture is not "punishment," but it is nevertheless a "depriv[ation] . . . of property"; when that deprivation occurs pursuant to a statute that declares property guilty *which is in fact innocent*, the deprivation occurs without "due process of law." U.S. Const. amend. XIV. The *due process* limitation on *in rem* forfeitures is the reason courts have sometimes suggested that the innocent-owner rule may not apply if the owner's property was stolen. *See, e.g.*, *Peisch v. Ware*, 8 U.S. 347, 365 (1808) ("[T]he law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no controul."); *Commonwealth v. Certain Motor Vehicle*, 261 Mass. 504, 509–10 (1928) (holding that the *in rem* forfeiture of a motor vehicle containing liquor intended for sale was not a "taking of property without due process of law in violation of the Fourteenth Amendment," but declining to "pass upon the further question . . . whether the right to forfeit extends to property the actual control

of which the true owner has never intentionally relinquished to another, that is, to property taken from him by a thief").

As one nineteenth-century treatise explained, while spirits produced by an illicit distillery in Maine can be made forfeitable, the Due Process Clause would prohibit a legislature from imposing an *in rem* forfeiture on spirits the illicit distiller imported into New Orleans: The imported spirits would not be guilty "either in fact or under the fiction known to legal science." Waples, *supra*, § 156. There would be "no *jus in re*," and "[t]o take such property by proceedings *in rem* would not be to take it by 'due process of law.'" *Id.*

Importantly, this due process limitation was *not* related to a concern with *proportionality* between the value of the forfeited property and the egregiousness of the crime. The same treatise endorsed clearly disproportionate forfeitures. It observed, for example, that the federal government had regulated distilleries' bookkeeping and had provided for the *in rem* forfeiture of the distillery and land it occupied if the distillery's books did not comply with these requirements, even by the "omission of the distiller to enter some of the minor matters required—the quantity of ice—the weight of a certain washtub." *Id.* § 162. The treatise explained that the *in rem* forfeiture in that circumstance was constitutional because "Congress cannot constitutionally provide that property shall be condemned as guilty by proceedings *in rem* where there is no offense to be imputed; but *it can provide*

for such condemnations for offenses resting upon apparently unimportant facts." Id. (emphasis added).

Justice Scalia was thus correct to suggest in *Austin* that the Constitution prevents the government from taking, on an *in rem* theory, "property that cannot properly be regarded as an instrumentality of the offense." *Austin*, 509 U.S. at 627–28 (Scalia, J., concurring). He located this constitutional limitation, however, in the wrong provision. Cases and commentators have recognized that this requirement, that property subject to *in rem* forfeiture be connected to the violation of the law, is an implication of the Due Process Clause, not the Excessive Fines Clause. *See Certain Motor Vehicle*, 261 Mass. at 509–10; Waples, *supra*, § 156.

Moreover, the Excessive Fines Clause, whose "touchstone . . . is the principle of proportionality," *Bajakajian*, 524 U.S. at 334, cannot justify this requirement. Whether a sufficient link exists between a particular property and a particular crime has nothing to do with proportionality—a comparison of *significance*—but has instead to do with *causal connection* between the property and the crime. *See* Waples, *supra*, § 162.

Other than the (incomplete) overlap between "fines" and "forfeitures" and the occasional observations courts have made regarding limits to the innocent-owner doctrine, the only other justification *Austin* provided for the proposition that *in rem* forfeitures are punishments is that the forfeiture provisions at

issue "expressly provide[d] an 'innocent owner' defense," which *Austin* suggested made those provisions "look more like punishment, not less." 509 U.S. at 619. Here again, however, the historical evidence corrects modern misconceptions. As Bishop's treatise explained, the essential attribute of an *in rem* forfeiture is that it proceeds against the property itself and is justified "by reason of [the property's] circumstances," such as how the property has been used. Bishop, *supra*, § 709. Such a forfeiture "is not to be deemed a punishment inflicted on its owner," and "it follows, that, if the law, in its clemency, permits the owner still to retain his property and avoid the forfeiture on showing himself innocent of any wrong in the matter, *there is no more a punishment involved in the case than there was before.*" *Id.* (emphasis added).

The historical evidence thus indicates that a legislature's decision to provide relief from an *in rem* forfeiture if the owner shows himself to be innocent is irrelevant to whether the forfeiture is a penalty and thus irrelevant to the applicability of the Excessive Fines Clause. Indeed, making the Excessive Fines Clause's applicability turn on the existence of an exception for innocent owners would encourage precisely the sort of draconian rules the Clause is meant to prevent: It would motivate legislatures to refuse to grant any exceptions to innocent owners, lest they subject *in rem* forfeitures to proportionality review by courts. Statutory exceptions for innocent owners have long been used to mitigate the sometimes-harsh consequences of *in rem* forfeitures. *See* Waples, *supra*, § 148 ("[T]he general principle, that forfeiture is irre-

spective of owner, is subject to legislative modification."). For good reasons, no court has held that such exceptions transform *in rem* forfeitures into penalties.[5]

4. If the Court were to reconsider *Austin*, the factors pertinent to "deciding whether to overrule a past decision" all weigh in favor of overturning it. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018). As discussed above, *Austin* is not "consisten[t] with other related decisions," *id.*, and the historical evidence shows the poor "quality of [its] reasoning." *Id.*

In addition, overturning *Austin* would not frustrate significant "reliance" interests. *Id.* at 2479, 2484. *Austin* expressly declined to articulate any

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[5] Historical evidence also flatly contradicts the contention of *amici* that historical *in rem* forfeitures were different than modern-day *in rem* forfeitures because the "essential evidence underlying" historical forfeitures "was both indisputable and borne by the defendant property itself as found and seized without more." Cause of Action Institute Amicus Br. 21. Nineteenth-century *in rem* forfeiture proceedings frequently required evidence in addition to the *res* itself. *See generally* Waples, *supra*, § 148 (listing examples of statutory *in rem* forfeitures). A ship, for example, could not by itself show that it was used to violate an embargo; the captain would need to testify where the ship docked. *See, e.g.*, *The Little Charles*, 26 F.Cas. 979, 982 (C.C.D. Va. 1818). Nor could a ship demonstrate that it was used to violate a state fishing law; witnesses would need to testify regarding where and how the ship was used. *See, e.g.*, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). Similarly, without witness testimony, a court could not know whether vehicles transporting alcohol were used *for the purpose of* evading the revenue laws. *See, e.g.*, *United States v. Two Bay Mules*, 36 F. 84 (W.D.N.C. 1888).

standard for assessing the excessiveness of *in rem* forfeitures, 509 U.S. at 622–23, much less "define[] . . . a clear or easily applicable standard," *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098, (2018); *see also Janus*, 138 S. Ct. at 2484.

In any case, *Austin* has prompted no significant practical consequences. In the quarter-century since the decision, federal courts have held *in rem* forfeitures to be unconstitutionally excessive only a dozen times.[6] The number of unconstitutional *in rem* forfeitures is strikingly low, particularly in light of the tens of thousands of assets—to say nothing of the dollar value of those assets—the Department of Justice seizes each year. Department of Justice, *5-yr Summary of Seizure and Forfeiture Trends*, https://www.justice.gov/afp/file/5-yr_forfeiture_trends.pdf/download.

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[6] *United States v. One Single Family Residence*, 13 F.3d 1493 (11th Cir.1994); *von Hofe v. United States*, 492 F.3d 175, 191 (2d Cir. 2007); *United States v. $120,856 in U.S. Currency*, 394 F.Supp.2d 687 (D.V.I. 1993); *United States v. 835 Seventh Street*, 820 F.Supp. 688 (N.D.N.Y. 1993); *United States v. 461 Shelby County Road 361*, 857 F.Supp. 935, 940 (N.D. Ala., 1994); *United States v. 6625 Zumirez Drive*, 845 F.Supp. 725, 742 (C.D. Cal. 1994); *United States v. One 1988 White Jeep Cherokee*, 30 V.I. 75, 80 (D.V.I. 1994); *United States v. Shelly's Riverside Heights Lot X*, 851 F.Supp. 633 (M.D. Pa. 1994); *United States v. 3636 Roselawn Ave.*, 1994 WL 524985 (C.D. Cal. 1994); *United States v. 18900 S.W. 50th Street*, 915 F.Supp. 1199 (N.D. Fla. 1994); *United States v. $293,316 in U.S. Currency*, 349 F.Supp.2d 638 (E.D.N.Y. 2004); *United States v. Ford Motor Co.*, 442 F.Supp.2d 429, 437 (E.D. Mich. 2006).

B. If the Court interprets the Excessive Fines Clause to extend to *in rem* forfeitures, history shows that the Clause does not apply to the States

If the Court concludes that *Austin* requires rejecting an interpretation of the Excessive Fines Clause that applies the Clause only to *in personam* penalties, the historical evidence demands reading the Fourteenth Amendment not to incorporate the Excessive Fines Clause against the States. The Fourteenth Amendment was ratified in 1868. Yet no court applied the Excessive Fines Clause to *any in rem* forfeitures—state or federal—until *124* years later. *See United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 32 (2d Cir. 1992). States imposed countless *in rem* forfeitures during that long stretch of history; it is highly unlikely that litigants and courts went nearly one-and-a-quarter centuries without an opportunity to argue that *in rem* forfeitures might be limited by the federal constitution. Much more likely is that the Fourteenth Amendment's ratifiers did not understand the Amendment to apply a proportionality requirement to States' *in rem* forfeitures.

Even beyond evidence of the Fourteenth Amendment's original meaning, historical evidence establishes that the right Timbs asserts here—to be free from "disproportionate" *in rem* forfeitures—is neither "fundamental to our scheme of ordered liberty," nor "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767 (internal quotation marks and emphasis omitted). Far from being fundamental

or deeply rooted, the rule Timbs seeks to apply against the States is a mere twenty-five years old. In contrast, the practice here, the "[f]orfeiture of vehicles bearing [contraband,] is one of the time-honored methods adopted by the government for the repression of . . . crime." *Gen. Motors Acceptance Corp. v. United States*, 286 U.S. 49, 56 (1932).

No contemporaneous evidence attests to the *existence*, much less the fundamentality, of a rule requiring *in rem* forfeitures to be proportional, and the few cases to consider this rule before the late twentieth century *rejected* it. *See House and Lot*, 204 Ala. 108 at 108–09; *Thornson*, 170 Minn. at 352–53; *Moore*, 293 Ky. at 55. A greater contrast with the voluminous evidence the Court compiled in *McDonald* is scarcely imaginable. *Cf. McDonald*, 561 U.S. at 767–78. If the Excessive Fines Clause applies to *in rem* forfeitures, it cannot apply to the States.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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Dated: October 4, 2018

Appendix
State Constitution
Excessive Fines Clauses

State	First Excessive Fines Clause	Subsequent Clauses
AL	ALA. CONST. of 1819, art. I, § 16	Analogous provision present in the current Alabama constitution and the constitutions of 1901, 1875, 1868, 1865, 1861.
AR	ARK. CONST. of 1836, art. II, § 17	Analogous provision present in the current Arkansas constitution and the constitutions of 1874, 1868, 1864, 1861.
CA	CAL. CONST. of 1849, art. I, § 6	Analogous provision present in the current California constitution and the constitution of 1879.
CT	CONN. CONST. of 1818, art. I, § 13	Analogous provision present in the current Connecticut constitution and the constitution of 1965.

State	First Excessive Fines Clause	Subsequent Clauses
DE	DEL. CONST. of 1792, art I, § 11	Analogous provision present in the current Delaware constitution and the constitutions of 1897, 1831.
FL	FLA. CONST. of 1838, art. I, § 12	Analogous provision present in the current Florida constitution and the constitutions of 1968, 1885, 1868, 1865, 1861.
GA	GA. CONST. of 1777, art. LIX	Analogous provision present in the current Georgia constitution and the constitutions of 1983, 1976, 1945, 1877, 1868, 1865, 1861.
IL	ILL. CONST. of 1818, art. VIII, § 14	Proportionality of penalties clause. Analogous provision present in the current Illinois constitution and the constitutions of 1970, 1870, 1848.

State	First Excessive Fines Clause	Subsequent Clauses
IN	IND. CONST. of 1816, art. I, § 15	Analogous provision present in the current Indiana constitution and the constitution of 1851.
IA	IOWA CONST. of 1857, art. I, § 17	Analogous provision present in the current Iowa constitution.
KS	KAN. CONST. of 1859, Bill of Rights, § 9	Analogous provision present in the current Kansas constitution.
KY	KY. CONST. of 1792, art. XII, § 15	Analogous provision present in the current Kentucky constitution and the constitutions of 1850, 1799.
LA	LA. CONST. of 1864, tit. VII, art. CVII	Analogous provision present in the constitutions of 1921, 1913, 1898, 1879, and 1868; 1974 constitution contains a more generic excessive punishment clause.

State	First Excessive Fines Clause	Subsequent Clauses
ME	ME. CONST. of 1820, art. I, § 9	Proportionality of penalties clause. Analogous provision present in the current Maine constitution.
MD	MD. CONST. of 1776, art. XXII	Analogous provision present in the current Maryland constitution and the constitution of 1867 while the 1846 and 1776 constitutions prohibited cruel and unusual penalties.
MA	MASS. CONST. of 1780, pt. I, art. XXVI	Analogous provision present in the current Massachusetts constitution.
MI	MICH. CONST. of 1835, art. I, § 18	Analogous provision present in the current Michigan constitution and the constitutions of 1963, 1908, 1850.

State	First Excessive Fines Clause	Subsequent Clauses
MN	MINN. CONST. of 1857, art. I, § 5	Analogous provision present in the current Minnesota constitution.
MS	MISS. CONST. of 1817, art. I, § 16	Analogous provision present in the current Mississippi constitution and the constitutions of 1890, 1868, 1832.
MO	MO. CONST. of 1820, art. XIII, § 12	Analogous provision present in the current Missouri constitution and the constitutions of 1945, 1875, 1865.
NE	NEB. CONST. of 1867, art. I, § 6	Analogous provision present in the current Nebraska constitution and the constitution of 1875; the current Nebraska constitution also contains a separate proportionality clause, NEB. CONST. art. I, § 15.

State	First Excessive Fines Clause	Subsequent Clauses
NV	NEV. CONST. of 1864, art. I, § 6	Analogous provision present in the current Nevada constitution.
NH	N.H. CONST. of 1784, pt. I, art. XXXIII	Analogous provision present in the current New Hampshire constitution.
NJ	N.J. CONST. of 1844, art. I, § 15	Analogous provision present in the current New Jersey constitution and the constitution of 1947.
NY	N.Y. CONST. of 1846, art. I, § 5	Analogous provision present in the current New York constitution and the constitution of 1894.
NC	N.C. CONST. of 1776, Declaration of Rights, § 10	Analogous provision present in the current North Carolina constitution and the constitutions of 1971, 1868.

State	First Excessive Fines Clause	Subsequent Clauses
OH	OHIO CONST. of 1802, art. VIII, § 13	Analogous provision present in the current Ohio constitution and the constitutions of 1912, 1851.
OR	OR. CONST. of 1857, art. I, § 16	Analogous provision present in the current Oregon constitution.
PA	PA. CONST. of 1776, ch. II, § 29	The 1776 Pennsylvania constitution contained a moderate fines clause while the constitutions of 1968, 1874, 1838, 1790 and the current Pennsylvania constitution contain an excessive fines clause.
RI	R.I. CONST. of 1842, art. I, § 8	Analogous provision present in the current Rhode Island constitution and the constitution of 1986.

State	First Excessive Fines Clause	Subsequent Clauses
SC	S.C. CONST. of 1778, art. XL	The 1778 South Carolina constitution contained a proportionality of punishments clause while the constitutions of 1865, 1861, 1790 and the current South Carolina constitution contain an excessive fines clause.
TN	TENN. CONST. of 1796, art. XI, § 16	Analogous provision present in the current Tennessee constitution and the constitutions of 1870, 1835.
TX	TEX. CONST. of 1836, Declaration of Rights, § 11	Analogous provision present in the current Texas constitution and the constitutions of 1875, 1869, 1866, 1861, 1845.

State	First Excessive Fines Clause	Subsequent Clauses
VT	VT. CONST. of 1777, ch. II, § 26	The 1777 Vermont constitution contained a moderate fines clause while the 1786 and current Vermont constitutions contain a proportionality of fines clause.
VA	VA. CONST. of 1776, Declaration of Rights, § 9	Analogous provision present in the current Virginia constitution and the constitutions of 1971, 1902, 1870, 1864, 1851, 1830.
WV	W. VA. CONST. of 1862, art. II, § 2	Analogous provision present in the current West Virginia constitution and the constitution of 1872.
WI	WIS. CONST. of 1848, art. I, § 6	Analogous provision present in the current Wisconsin constitution.

No. 17-1091

In The
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ Of Certiorari To The Indiana Supreme Court

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ARGUMENT

I. The Excessive Fines Clause applies to the States under the Fourteenth Amendment's Due Process Clause.

The State of Indiana does not dispute Tyson Timbs's (Petitioner) straightforward answer to the Question Presented: The Excessive Fines Clause applies to the States. The State also does not dispute that the Indiana Supreme Court erred in holding otherwise. Instead, the State proposes to reinvent the wheel—first, for the incorporation doctrine, and, failing that, for the Excessive Fines Clause. Both arguments are without merit.

The State devotes most of its brief to arguing that the Excessive Fines Clause should apply to the States under a different—and more lenient—standard than applies to the federal government. Even though civil forfeitures are "fines" at the federal level, the State suggests that they are not fines at the state level. Accepting that view would "undermine[]" "decades of decisions," *see McDonald* v. *City of Chicago*, 561 U.S. 742, 788 (2010) (plurality opinion), and give rise to uncertainty about the scope of core Bill of Rights protections. There is no reason to upset the "well established" incorporation standard in this way. *Id.* at 750.

The State's alternative argument is equally extreme. The State proposes to neuter the Excessive Fines Clause's protections across all types of government—federal, state, and local alike. In the State's view, the Court should overrule the leading decision

construing the Clause, *Austin* v. *United States*, 509 U.S. 602 (1993), and announce a categorical rule that the Clause can never apply to civil forfeitures. Yet the State offers no reason to address that issue in this case, not least because *Austin* was rightly decided. At base, the correct approach is the simplest one. Rather than overrule settled authorities, the Court should apply those authorities, reverse the Indiana Supreme Court's judgment, and remand for further proceedings.

A. The Clause applies to the States in the same way it applies to the federal government.

The State does not appear to contest that the Excessive Fines Clause should be incorporated. It focuses, instead, on the procedural device by which it is attempting to take Petitioner's property. Civil *in rem* forfeitures, the State contends, were traditionally understood as nonpunitive. Resp. Br. 37–41. And for that reason, the right to be free from excessive penalties through civil forfeiture—specifically—is not fundamental and does not merit incorporation. Resp. Br. 11–13, 58–59. This argument was not the basis for the Indiana Supreme Court's judgment. The court rejected the Clause in all circumstances, whether a given proceeding is labeled criminal or civil, *in personam* or *in rem*. *See* Pet. App. 2, 8. Even setting that aside, the State's effort to rehabilitate the Indiana Supreme Court's judgment lacks merit; not only does it break with a half-century of incorporation precedent, it also misunderstands the right at issue.

1. In *Austin* v. *United States*, this Court held that the Excessive Fines Clause applies to civil *in rem* forfeitures when they "serv[e] in part to punish." 509 U.S. 602, 610 (1993); *see also id.* at 626 (Scalia, J., concurring in part and concurring in the judgment) ("[T]he *in rem* forfeiture in *this* case is a fine."). That decision applies to civil-forfeiture statutes enforced by the federal government. But the State argues that a different standard should apply to forfeiture laws enforced by the States. *See, e.g.*, Resp. Br. 7, 43–44, 57–58. "Although the Court's decision in *Austin* applied the Excessive Fines Clause to *federal in rem* forfeitures," the State says, "*Austin* said nothing about *state* forfeitures." Resp. Br. 44.

That "two-track approach" to incorporation is one this Court has repudiated "for the past half century." *McDonald*, 561 U.S. at 788 (plurality opinion). The Court has "abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Id.* at 765 (majority opinion) (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 10–11 (1964)). "Instead, the Court decisively held that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Id.* (quoting *Malloy*, 378 U.S. at 10).

This precedent forecloses the State's position. The State appears not to dispute that the Excessive Fines Clause applies to the States. *Austin* holds that the

Clause covers punitive civil forfeitures imposed by the federal government. And *McDonald*, *Malloy*, and similar decisions reflect a "single, neutral principle" under which incorporated protections apply identically to the federal government and to the States. *See McDonald*, 561 U.S. at 788–89 (plurality opinion); *see also id.* at 765–66 (majority opinion) (collecting authority). Together, these decisions apply the Excessive Fines Clause to federal civil forfeitures and confirm that the Clause must apply to the States in the same way.

2. The State gives no reason to depart from this precedent. Instead, it parses the Excessive Fines Clause beyond recognition. The right to be free from excessive fines, the State contends, is entirely different from the right to be free from "disproportionate *in rem* forfeitures." Resp. Br. 4. By this logic, Petitioner must show that the right to be free from excessive *in rem* forfeitures—specifically—is fundamental to our legal tradition. *See* Resp. Br. 8.

This "right-specific approach" (Resp. Br. 9) misreads both the Excessive Fines Clause and the incorporation doctrine. Contrary to the State's view, the Excessive Fines Clause secures a single, unitary right: freedom from excessive economic sanctions that are at least partly punitive. To be sure, that right can be violated in countless ways, using countless tools; in this regard, governments are endlessly innovative, "with more and more civil laws bearing more and more extravagant punishments." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). But whatever

new tools governments may contrive, the Excessive Fines Clause ensures that when the government takes property as punishment, it cannot take an "excessive" amount. That right is fundamental to ordered liberty and built into the bedrock of our legal tradition. *See* Pet. Br. 10–25. And it remains so no matter what procedural device the government uses. Petitioner need not establish a "fundamental" right to be free from excessive *in rem* forfeitures any more than capital defendants need to reargue incorporation for each new lethal-injection protocol.

The State's survey of nineteenth-century *in rem* forfeitures only reveals its approach to be unworkable. Even if the State were correct that historical *in rem* forfeitures were uniformly understood as nonpunitive and outside the scope of the Excessive Fines Clause—and there is reason to doubt both propositions, *see* pp. 11–18, *infra*—that says nothing about the right to be free from excessive economic sanctions that *are* punitive. Nor does the State's account shed light on the separate question—not at issue here—whether modern *in rem* forfeitures *can be* punitive. As four Justices noted in *Austin*, modern *in rem* forfeitures have punitive features that eighteenth- and nineteenth-century forfeitures may have lacked. *See Austin*, 509 U.S. at 626 (Scalia, J., concurring in part and concurring in the judgment); *see also id.* at 628–29 (Kennedy, J., concurring in part and concurring in the judgment). And since *Austin*, the Court has noted that although "traditional" forfeitures were sometimes nonpunitive, "[i]t does not

follow, of course, that all modern civil *in rem* forfeitures are nonpunitive and thus beyond the coverage of the Excessive Fines Clause." *United States* v. *Bajakajian*, 524 U.S. 321, 331 & n.6 (1998).

The State's "right-specific approach" raises serious questions about the incorporation of other rights as well. In the State's view, the relevant question is not whether a *right* is fundamental, but whether preventing the government from violating that right *in a specific way* is fundamental. The problems with that approach are self-evident. The Fourteenth Amendment did not "fundamentally alter[] our country's federal system," *McDonald*, 561 U.S. at 754, to address only the specific abuses of 150 years ago, *see id.* at 787 (plurality opinion). It serves to ensure that everyone in the Nation has the same basic rights. And Americans routinely exercise those rights—and governments routinely violate them—in ways unimaginable two decades ago, much less two centuries. If the State's theory were correct, Mark Janus would have had to establish that his right not to pay union dues was fundamental in the nineteenth century. *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2460 (2018). David Riley would have had to show the historical pedigree of his right not to have "digital information on a cell phone seized." *Riley* v. *California*, 134 S. Ct. 2473, 2480 (2014). Lester Packingham would have needed historical proof of a right "to gain access to ... commonplace social media websites like Facebook and Twitter." *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1733 (2017).

To state the obvious, that is not how incorporation works. Nor do the three decisions the State cites suggest otherwise. Resp. Br. 9 (discussing *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), *Wolf* v. *Colorado*, 338 U.S. 26 (1949), and *Aguilar* v. *Texas*, 378 U.S. 108 (1964)). The majority in *McDonald* made clear, for example, that *Apodaca* "does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." 561 U.S. at 766 n.14. Indeed, what the State styles as the holding of "the Court" in *Apodaca* (Resp. Br. 12) reflected the views of one Justice. *See McDonald*, 561 U.S. at 766 n.14; Pet. Br. 25 n.5; *see generally* Br. of Amicus NAACP Legal Def. & Educ. Fund 22–29 (calling on the Court to reevaluate *Apodaca* based on historical evidence that Oregon's and Louisiana's non-unanimous jury rules were inspired by racial and religious animus).

Also mistaken is the State's view that the Fourth Amendment has been incorporated in the manner that it proposes for the Excessive Fines Clause. Resp. Br. 9. The two decisions the State cites involved two different guarantees of the Fourth Amendment, making it unremarkable that the Court recognized their incorporation in different cases. *See Aguilar*, 378 U.S. at 110 (warrant requirement); *Wolf*, 338 U.S. at 27–28 (freedom from unreasonable searches and seizures). In fact, the Court in *McDonald* cited *Aguilar* for the very proposition the State resists—that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to

the same standards that protect those personal rights against federal encroachment.'" 561 U.S. at 765–66 (majority opinion). And to the extent *Wolf* "held that particular Bill of Rights guarantees or remedies did not apply to the States," the Court "overruled" that decision in 1961. *See id.* at 766 (citing *Mapp* v. *Ohio*, 367 U.S. 643, 655–57 (1961)).

Put simply, the right to be free from excessive economic sanctions is deeply rooted in our Nation's history and tradition. And Petitioner is entitled to an opportunity to argue that forfeiture of his property would infringe that right. The Indiana Supreme Court denied him that opportunity based on the view that the Eighth Amendment does not apply to any economic sanction imposed by the States—no matter how punitive or excessive, no matter the procedural device. Because that legal conclusion was mistaken, the Indiana Supreme Court's judgment should be reversed and the case remanded so that Petitioner can argue excessiveness on the merits.[1]

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[1] The State's supporting amici devote a notable amount of their brief to Petitioner's "adventures in heroin trafficking." Br. of Amici Nat'l Ass'n of Counties et al. 34. Because Petitioner's conduct does not bear on the Question Presented, we do not address those characterizations at length. We note, however, that the record shows only one instance of there being heroin in Petitioner's vehicle: two grams, in a controlled buy. Hrg. Tr. 26:03–27:25, 37:03–37:12 (July 15, 2015). And to the extent there is evidence that heroin was in his vehicle at any other time (the record is far from clear on that point), the Indiana Court of Appeals concluded that "it was apparently for [Petitioner's] own use." Pet. App. 22. The court also believed that, under Indiana pleading rules, the State's complaint failed even to allege those "other criminal acts"

B. *Austin* v. *United States* was correctly decided and should not be overruled.

Perhaps recognizing that *Austin* forecloses its leading theory, the State argues in the alternative that *Austin* should be overruled, so that all governments—federal, state, and local—can impose excessive civil forfeitures without Eighth Amendment limits. *See* Resp. Br. 44–57. This argument is meritless. The State offers no persuasive reason to question *Austin* or the decisions that have reaffirmed it. And the State ignores the grave consequences of giving governments more power to strip Americans of their property.[2]

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as predicates for forfeiture. Pet. App. 22. Of course, these questions are all ones the Indiana Supreme Court would be free to consider on remand.

[2] This argument, too, was not the basis for the judgment of the Indiana Supreme Court. And although this Court has discretion to "affirm on any ground that the law and the record permit and that will not expand the relief granted below," *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984), this case is an exceptionally poor candidate for exercising that discretion. Far from being "permit[ted]" by law, the State's new basis for affirmance is foreclosed by law; that is why the State is calling for *Austin* to be overruled. Additionally, the premise of the State's argument—that civil forfeitures are categorically nonpunitive—contradicts the State's repeated concessions before the Indiana Supreme Court that "most of what is occurring here is punitive" and that a "grossly disproportionate" forfeiture would indeed violate Petitioner's rights. Oral Arg. 15:01–15:04, *State* v. *Timbs*, No. 27S04-1702-MI-70 (Ind. Mar. 23, 2017), https://tinyurl.com/y8alhl3p; *see also id.* 1:41–2:28, 9:17–9:37, 11:39–13:10, 14:13–15:18. As in *McDonald*, there is thus no reason to "reopen the question" of the Excessive Fines Clause's scope in deciding whether the Clause is incorporated. *See* 561 U.S. at 788 (plurality opinion).

1. The State offers no reason to reevaluate *Austin*'s holding. The Court in that case was unanimous that the Excessive Fines Clause applies to economic sanctions that "can only be explained as serving in part to punish." 509 U.S. at 610; *see also id.* at 623, 626–27 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 628 (Kennedy, J., concurring in part and concurring in the judgment). The Court then held—and the concurring Justices agreed—that *in rem* forfeitures under federal law "constitute[ ] 'payment to a sovereign as punishment for some offense.'" *Id.* at 622 (quoting *Browning-Ferris Indus. of Vt.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). Several features of the relevant federal laws supported this conclusion. For example, the laws "expressly provide[d] an 'innocent owner' defense," which "focus[ed] the provisions on the culpability of the owner in a way that makes them look more like punishment, not less." *Id.* at 619. They were "tie[d] . . . directly to the commission of drug offenses." *Id.* at 620. And they extinguished title to property whose value had "absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." *Id.* at 621 (quoting *United States* v. *Ward*, 448 U.S. 242, 254 (1980)). Whatever remedial purposes the laws might serve, they were at least partly punitive and thus "subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Id.* at 622.

a. The State does not appear to quarrel with *Austin*'s reasoning that the Excessive Fines Clause applies to economic sanctions that are at least partly punitive. *See, e.g.*, Resp. Br. 6, 45. Instead, the State contends that modern *in rem* forfeitures can never come within the Clause because—as a blanket rule—"*in rem* forfeitures are *not* punishments." Resp. Br. 45; *see also* Resp. Br. 52. But the State's historical "distinction between *in rem* forfeitures and *in personam* fines" (Resp. Br. 37) ignores modern forfeiture laws and precedent. Whatever might be said of *in rem* forfeitures historically (and the State says a lot), modern "forfeiture laws have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture." *Bajakajian*, 524 U.S. at 331 n.6. That is why the Court held in *Austin*—and reaffirmed in *Bajakajian*—that "a modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam*." *Id.*; *see also Kokesh* v. *S.E.C.*, 137 S. Ct. 1635, 1645 (2017) ("[W]e have emphasized 'the fact that sanctions frequently serve more than one purpose.'").

Indiana's forfeiture statute illustrates the point. The State asserts that "[t]he validity of the forfeiture ... turns not on *Timbs's* culpability but on the *Rover's*." Resp. Br. 10. But unlike in the historical forfeiture cases the State relies on, the State of Indiana had to prove Petitioner's individual culpability *as part of its case-in-chief*. To forfeit Petitioner's vehicle, the State had to show not only a link between the property and

a crime, but "also" that "a person who has an ownership interest . . . knew or had reason to know that the vehicle was being used in the commission of the offense." Ind. Code § 34-24-1-4(a); *see also id.* § 34-24-1-5. In this way, the Indiana forfeiture statute is designed to punish wrongdoing even more than were the statutes in *Austin*. Innocence is merely an affirmative defense under 21 U.S.C. §§ 881(a)(4) and (a)(7); in Indiana, by contrast, the State could take Petitioner's vehicle only by proving a degree of personal negligence or fault "by a preponderance of the evidence." Ind. Code § 34-24-1-4(a); *see also Curtis* v. *State*, 987 N.E.2d 523, 524 (Ind. Ct. App. 2013). That, presumably, is why the State conceded in the Indiana Supreme Court that "most of what is occurring here is punitive." Oral Arg. 15:01–15:04, *State* v. *Timbs*, No. 27S04-1702-MI-70 (Ind. Mar. 23, 2017), https://tinyurl.com/y8slhl3p.

b. The State's catalogue of eighteenth- and nineteenth-century forfeiture cases does not change the analysis. The State devotes much of its brief to arguing that *in rem* forfeitures in centuries past were sometimes viewed as nonpunitive. *See* Resp. Br. 17–44. But that is of little help in determining whether modern civil-forfeiture laws can have punitive dimensions. In *Austin*, for example, the government analogized at length to historical *in rem* forfeitures. *See* Br. for United States 12–26, *Austin* v. *United States*, No. 92-6073. And four Justices in *Austin* noted that "personal culpability" may not have always been "essential" for "traditional *in rem* forfeiture." *See Austin*, 509 U.S. at 626 (Scalia, J., concurring in part and concurring in the

judgment); *see also id.* at 628–29 (Kennedy, J., concurring in part and concurring in the judgment). Even so, the Court spoke with one voice in holding that modern *in rem* forfeitures have punitive features that bring them within the Excessive Fines Clause. Likewise in *Bajakajian*, the Court noted that, although *in rem* forfeitures may not have been uniformly considered punitive in the past, "[i]t does not follow, of course, that all modern civil *in rem* forfeitures are nonpunitive and thus beyond the coverage of the Excessive Fines Clause." 524 U.S. at 331 n.6; *accord Hughley* v. *State*, 15 N.E.3d 1000, 1005 (Ind. 2014) (acknowledging that civil forfeitures "have significant criminal and punitive characteristics" and are "criminal-like penalties").

The State's survey of historical cases only further undermines its criticisms of *Austin*. For example, the State suggests that *Austin* misconstrued the word "fines" to include punitive *in rem* forfeitures. Resp. Br. 50–51. Yet the State's leading authority suggests the opposite. *See Hanscomb* v. *Russell*, 77 Mass. 373 (1858). The court in *Hanscomb* observed that "the word 'fine' was ... used in a 'restricted and technical sense'" to denote only criminal "pecuniary punishments." Resp. Br. 51. But having identified that "restricted and technical" meaning, the court rejected it as inconsistent with "the common and approved usage of the language." 77 Mass. at 375 (citation omitted). "[T]he word 'fines' means forfeitures and penalties recoverable in civil actions, as well as pecuniary punishments inflicted by sentence." *Id.*

Equally without merit is the State's claim that *in rem* forfeitures were never "regarded as punishments" in the nineteenth century. Resp. Br. 51 (quoting 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law*, § 723, at 402 (3d ed. 1865)). In fact, the State's own authority acknowledges that some *in rem* forfeitures could indeed be punitive. "[D]isguise the matter as we may, under whatever form of words," Professor Bishop remarked, "if the intent which the owner of property carries in his bosom is the gist of the thing on which the forfeiture turns, then the question is one of the criminal law, and the forfeiture is a penalty imposed for crime." Bishop, *supra*, § 708, at 395.

Other contemporary authorities also recognized that *in rem* forfeitures could be punitive and thus subject to constitutional limits. For example, one commentator voiced concern that forfeiting "a whole cargo for the illegal character of a distinct part ... may be regarded as extreme, if not excessive." 2 Theophilus Parsons, *A Treatise on Maritime Law* 95–96 (1859). Another noted that "forfeiture of . . . property used to commit [an] unlawful act" is "subject to no express constitutional restraint except where the constitution provides that every penalty must be proportionate to the offense." Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* § 525, at 558 (1904). And this Court in 1886 declared itself "clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Boyd* v. *United*

States, 116 U.S. 616, 633–34. In sum, the State's absolutist view of "traditional" forfeitures is not just beside the point—it is wrong.

c. The State is also incorrect that "subsequent decisions have undermined *Austin*'s reasoning." Resp. Br. 46. The State notes that *in rem* forfeitures "do not constitute 'punishment' for purposes of the Double Jeopardy Clause," *United States* v. *Ursery*, 518 U.S. 267, 270–71 (1996), and suggests that the same rule should apply under the Excessive Fines Clause, *see* Resp. Br. 46–49. Yet the Court in *Ursery* confirmed emphatically that "*Austin* ... did not involve the Double Jeopardy Clause at all," that the reasoning in *Austin* was "wholly distinct" from the double-jeopardy analysis, and that "[t]he holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment." 518 U.S. at 286, 287. Two Terms later, the Court justified reading the Double Jeopardy Clause narrowly in part *because* the Excessive Fines Clause applies to both criminal fines and civil forfeitures. *See Hudson* v. *United States*, 522 U.S. 93, 103 (1997) (citing *Austin*, 509 U.S. 602).

The State posits that the Court erred in all of this. *See* Resp. Br. 48–49. Yet there are obvious reasons for construing the two Clauses differently. The Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense," *Hudson*, 522 U.S. at 99, while the Excessive Fines Clause "includes no similar limitation," *Austin*, 509 U.S. at 608. And the consequences of deeming a legal sanction "punishment" are vastly different under

the two Clauses. When successive "punishment" is imposed under the Double Jeopardy Clause, the second proceeding must end. But if a sanction is "punishment" under the Excessive Fines Clause, courts go to "the second stage of inquiry," which "asks whether the particular sanction in question is so large as to be 'excessive.'" *Ursery*, 518 U.S. at 287.

Summarizing the first two decisions that the State says "undermine" *Austin*: In one, the Court emphasized that it was not disturbing *Austin* at all, *see id.* at 286, and in the other, the Court cited *Austin* approvingly for the very proposition the State now disputes—that "[t]he Eighth Amendment protects against excessive civil fines, including forfeitures." *Hudson*, 522 U.S. at 103. And *Bajakajian*—the final decision the State relies on (Br. 49)—ratifies *Austin*'s holding even more directly. The State is correct that the Court in *Bajakajian* observed that "[t]raditional *in rem* forfeitures were ... not considered punishment against the individual for an offense." 524 U.S. at 331. But the Court contrasted those "[t]raditional" forfeitures with "*modern* civil *in rem* forfeitures," which "have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture." *Id.* at 331 n.6 (emphasis added). Far from "vitiat[ing]" *Austin*, Resp. Br. 49, the Court in *Bajakajian* reaffirmed *Austin*'s holding: "a modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam*." 524 U.S. at 331 n.6 (citing *Austin*, 509 U.S. at 621–22).

In short, *Austin* harmonizes perfectly with all the precedent identified by the State. Far from being "undermined," *Austin* has been reaffirmed at every turn—even in the State's cited authority. *Austin* also has commonsense appeal. "Modern civil forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes." *Leonard* v. *Texas*, 137 S. Ct. 847, 847 (2017) (statement of Thomas, J., respecting denial of certiorari) (citing *Austin*, 509 U.S. at 618–19). And often, they "impose penalties far more severe than those found in many criminal statutes." *Dimaya*, 138 S. Ct. at 1229 (Gorsuch, J., concurring in part and concurring in the judgment); *see also id.* (noting "forfeiture provisions that allow homes to be taken"). These "law enforcement Weapons of Mass Destruction" are punitive, *see Sargent* v. *State*, 27 N.E.3d 729, 735 (Ind. 2015) (Massa, J., dissenting), and *Austin* was correct in so holding.

d. The State's residual criticisms of *Austin* lack merit also.

First, the State perceives a tension between applying the Excessive Fines Clause to *in rem* forfeitures and the notion that innocent people can—under current doctrine—lose their property to forfeiture. Resp. Br. 24–26, 41. But when forfeitures are at least partly punitive, innocent owners can interpose a defense under the Excessive Fines Clause. In fact, in the Court's most recent case involving constitutional protections for innocent owners, three dissenting Justices suggested that the blameless property owner should have done just that. *See Bennis* v. *Michigan*, 516 U.S. 442,

471 (1996) (Stevens, J., dissenting) ("[T]he forfeiture of petitioner's half interest in her car is surely a form of 'excessive' punishment."). And this is nothing new. In 1844, for example, this Court affirmed the forfeiture of the brig *Malek Adhel*, even though its owners were innocent of the master's acts of piracy. *Harmony* v. *United States* (*Malek Adhel*), 43 U.S. (2 How.) 210, 234 (Story, J.). At the same time, however, the Court ruled that the cargo, belonging to the innocent owners, must be returned. *Id.* at 237–38 ("We see no reason why the innocent cargo, under such circumstances, should be loaded with any cumulative burdens.").

Second, the State contends that the Excessive Fines Clause was meant only to protect against prison terms that could follow from unpaid pecuniary fines. Because "*in rem* forfeitures *cannot* deprive individuals of their liberty," the State asserts, they are unrelated to that "central original concern." Resp. Br. 42. That is incorrect. The amici the State relies on make clear that the Clause (and its precursors) also protected against impoverishment and disproportionate and unequal punishments. Br. of Amici Eighth Amend. Scholars 20–21, 24, 30 & nn.19–20. After all, "[f]or the Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense, altering only the form of the Star Chamber abuses that led to the provision of the English Bill of Rights, from which our Excessive Fines Clause directly derives." *Austin*, 509 U.S. at 624 (Scalia, J., concurring in part and concurring in the judgment).

2. With little elaboration, the State asserts that *stare decisis* considerations "all weigh in favor of overturning" *Austin*. Resp. Br. 56–57. But even setting aside the fact that *Austin* was rightly decided, the State's nonchalance is misplaced. Giving federal, state, and local governments *more* power to strip people of their property is serious business. If anything, the 25 years since *Austin* have shown that civil forfeiture demands more checks, not fewer. During this period, civil forfeiture has skyrocketed. "From 2001 to 2014, deposits to the DOJ and Treasury forfeiture funds exploded by more than 1,000 percent," with "[t]otal deposits across those years approach[ing] $29 billion." Institute for Justice, Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10 (2d ed. 2015) ("From 2001 to 2014, net assets in the DOJ and Treasury forfeiture funds increased 485 percent.").[3]

Across all levels of government, this phenomenon "has led to egregious and well-chronicled abuses." *Leonard*, 137 S. Ct. at 848 (statement of Thomas, J., respecting denial of certiorari). Earlier this year, for example, a federal court in New Mexico declared unconstitutional Albuquerque's self-financing forfeiture program. *Harjo* v. *City of Albuquerque*, 326 F. Supp. 3d 1145 (D.N.M. 2018). In September, Philadelphia entered into a consent decree, which, if approved by the district court, will overhaul the city's forfeiture program.

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[3] These figures include the federal government's civil and criminal forfeitures combined. Between 1997 and 2013, however, 87 percent of the Department of Justice's forfeitures were civil. Carpenter, *supra*, at 12–13.

See Philadelphia's Forfeiture Landmark: No longer can cops and prosecutors seize assets to fund their own pay, Wall St. J., Sept. 18, 2018. The list goes on.[4]

The State's perspective is also too narrow. For example, it notes that *Austin* "expressly declined to articulate any standard for assessing the excessiveness of *in rem* forfeitures." Resp. Br. 56–57. But this Court remanded for the lower court to consider that very question. *Austin*, 509 U.S. at 604, 622–23. And in the decades since, at least eight courts of appeals have done just that. *See generally* Brent Skorup, Comment, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 Geo. Mason U. Civ. Rts. L.J. 427, 440–45 (2012). The State ignores this body of law, even though overruling *Austin* would wipe it from the books.

The State next asserts that "*Austin* has prompted no significant practical consequences," because federal courts have held *in rem* forfeitures to be excessive

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[4] *See, e.g.*, Br. of Amici Drug Policy Alliance et al. 4–7 (charting the rise of federal forfeiture activity); Br. of Amici Scholars 19–20 (noting that violent crimes are solved at lower rates in cities that depend on fines, fees, and forfeitures for revenue); Br. of Amici DKT Liberty Project et al. 18–22 (similar); Br. of Amici ACLU et al. 22–30 (explaining how recidivism has increased where law enforcement has a financial incentive to impose excessive fines, fees, and forfeitures); *see also* Br. of Amicus Am. Bar. Ass'n 13–20 (explaining that local governments are defying *Bearden* v. *Georgia*, 461 U.S. 660 (1983), and imposing automatic debtors-prison sentences in at least 15 States); Br. of Amici Juvenile Law Ctr. et al. 8–10 (noting that the juvenile justice system is not immune to similar trends, with sometimes tragic results for youth and their families).

"only a dozen times." Resp. Br. 57. But that claim deserves more analysis than the two sentences the State gives it. To start, it is not clear why the State's numerator of federal-court decisions matters; almost by definition, "excessive" fines make up a small fraction of all fines. On top of that, the State's survey is incomplete. *See, e.g.*, *United States* v. *3814 NW Thurman St.*, 164 F.3d 1191, 1198, *opinion amended on denial of reh'g*, 172 F.3d 689 (9th Cir. 1999); *cf. United States* v. *1,679 Firearms* (*United States* v. *Ferro*), 659 F. App'x 422, 429 (9th Cir. 2016) (remanding for new excessiveness inquiry). And by citing federal decisions alone, the State overlooks the state high courts and state intermediate courts that have ruled against the government in Eighth Amendment challenges to civil forfeitures. *See generally* Pet. 13–18 & n.5.

The State's denominator is also flawed. The number of federal excessiveness rulings may be "low," Resp. Br. 57, but that is in part because most forfeitures never make it to court. Between 1997 and 2013, 88 percent of the Department of Justice's civil forfeitures were "administrative"—that is, performed by executive-branch officials. *See* Carpenter, *supra*, at 12–13 ("Absent judicial review, the sole determination of whether a forfeiture is warranted is made by the seizing agency, which usually stands to gain from the proceeds.").

II. The Excessive Fines Clause applies to the States under the Fourteenth Amendment's Privileges or Immunities Clause.

The freedom from excessive fines is one of the "privileges or immunities of citizens," which no State may abridge. *See* U.S. Const. amend. XIV, § 1. This alternative basis for incorporation prohibits state and local authorities from violating Americans' federal constitutional rights. The State ignores the text and history of the Privileges or Immunities Clause and asks only whether the Clause protects non-citizens and whether it protects rights beyond those in the first eight amendments. *See* Resp. Br. 13–17. Those questions can easily be avoided—either by applying the "well established" due-process framework discussed above or by resolving those questions in future cases that present them. No matter the answers, the Privileges or Immunities Clause protects Petitioner and protects the freedom from excessive fines enshrined in the Eighth Amendment.

1. The State correctly notes that the Privileges or Immunities Clause applies to "citizens" while the Due Process Clause applies to "any person." Resp. Br. 15. But this textual difference would hardly "leave the country wondering which provisions of the Bill of Rights would apply only to citizens," Resp. Br. 15, because the Court has already "incorporated almost all of the provisions of the Bill of Rights" through the Due Process Clause, *McDonald*, 561 U.S. at 764 & n.12 (majority opinion). The fundamental and deeply rooted rights guaranteed to "any person" under the Due

Process Clause will continue to apply to the States regardless of the Court's reasoning here.

In any event, Petitioner is a citizen, Timbs C.A. App. vol. 2, p. 21 (sealed presentence report), so nothing requires the Court to decide whether non-citizens enjoy the same "privileges or immunities." If the Court shares the State's concern, however, the solution is to hold that the Excessive Fines Clause is *also* incorporated through the Due Process Clause.

2. The State's other "urgent" questions are even further afield. Should this Court recognize that the Excessive Fines Clause is incorporated by the Privileges or Immunities Clause, that would not call into question whether "other provisions of the Bill of Rights remain 'clearly established' for the purpose of the Court's qualified immunity doctrine" (Resp. Br. 16) or whether "prior decisions remain 'clearly established Federal law' for the purpose of federal habeas proceedings." Resp. Br. 16. Other constitutional rights that are "clearly established" today will remain so, no matter how the Court chooses to resolve this case. It is also difficult to see how the incorporation of a federal constitutional right could undermine "clearly established Federal law." Incorporated rights are always clearly established federal rights.

CONCLUSION

The State's preferred approach would contradict many decisions of this Court and reopen the incorporation status of the entire Bill of Rights. The State's alternative approach would diminish the Excessive Fines Clause's protections across all levels of government. Because both approaches are misguided, the judgment of the Indiana Supreme Court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TYSON TIMBS *and*
A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ of Certiorari
to the Supreme Court of Indiana

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE**

The American Bar Association ("ABA") respectfully submits this amicus brief to urge the Court to consider the fundamental importance of the right to equal justice without regard to economic status and the essential role of the Excessive Fines Clause in preserving that right.

The ABA is one of the largest voluntary professional membership organizations in the United States. The ABA's more than 400,000 members include attorneys in private firms, corporations, nonprofit organizations, and government agencies, including prosecutors and defense counsel, as well as judges, legislators, law professors, law students, and non-lawyers in related fields.

The ABA has long recognized that lawyers have a special obligation to act as stewards of the system of justice. To that end, as the voice for American lawyers, the ABA has repeatedly advocated for equal justice as an essential attribute of the legal system. Less than a week after this Court held in *Gideon v. Wainwright* that a state must provide legal assistance to defendants too poor to pay for it, the ABA noted that its preexisting standards for the protection of indigents anticipated the decision, which it praised as a "great advance in the

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* Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

administration of criminal justice." James E. Clayton, *States Have Helped Whittle Away Own Rights: 30 Years of Revolution*, Wash. Post, Mar. 24, 1963, at E1; *Counsel for Poor Acclaimed by Bar: American Association Hails Supreme Court Rulings*, N.Y. Times, Mar. 21, 1963, at 5. In the years since *Gideon*, the ABA has consistently and forcefully sought to advance equal justice by submitting amicus briefs, organizing conferences, and adopting standards, guidelines, and recommended policies for courts and legislators.

Most recently, the ABA has focused on how judicially imposed fines that exceed a defendant's ability to pay subvert equal justice. In 2015 the ABA formed a Task Force to explore issues relating to the breakdown of trust between law enforcement and the communities they serve. *See* ABA, *Report of the Task Force on Building Public Trust in the American Justice System* (Jan. 2017), http://bit.ly/2QkjZJi. Building on that work, in 2017 and 2018, the ABA Working Group on Building Public Trust in the American Justice System addressed the concern that excessive judicial fines and fees "disproportionately harm the millions of Americans who cannot afford to pay them, entrenching poverty, exacerbating racial and ethnic disparities, diminishing trust in our justice system, and trapping people in cycles of punishment simply because they are poor." ABA Resolution 114 (Aug. 2018), Report at 2, http://bit.ly/2NhGzDy [hereinafter ABA *Guidelines*, Report]. In August 2018, the Working Group proposed, and the House of Delegates adopted, *Ten Guidelines on Fines and Fees*, designed to ensure equal treatment of rich and poor in the justice system, and to promote fair practices that consider a defendant's individual financial circum-

stances. *See* ABA, *Ten Guidelines on Fines and Fees* (Aug. 2018), http://bit.ly/2NhGzDy [hereinafter ABA *Guidelines*, Comm.].

For example, the Guidelines recommend a mandatory ability-to-pay hearing before a fine or fee can be imposed on a defendant. *Id.* at 7. Another Guideline urges courts never to incarcerate individuals solely because they are unable to pay a fine. *Id.* at 3. The Guidelines recommend, in addition, that courts and legislatures favor alternatives to monetary payments by defendants; bar harsh penalties, including incarceration, when ability to pay is not willful; guarantee a right to counsel for those facing fines and fees if nonpayment could result in incarceration; and protect against improper collection methods. *Id.* at 10. The Guidelines, however, are by no means the ABA's first contribution in this area. In large part, they refine, consolidate, and complement earlier ABA policies, criminal standards, and model ethical rules that have sought equal justice for all defendants without regard to economic status. *See, e.g.*, ABA Standards for Criminal Justice Sentencing, Standards 18-2.4, 18-3.16, & 18-3.22, http://bit.ly/2PHXzRS; *see also* ABA Resolution 110 (Aug. 2004), http://bit.ly/2P7E8kj (urging compliance with procedural safeguards when accused persons are ordered to make a payment for representation furnished to them at government expense); ABA Resolution 111B (Aug. 2016), http://bit.ly/2Lx6Zfx (urging state, local, territorial, and tribal legislatures to abolish "offender funded" systems of probation supervised by private, for profit companies); ABA Resolution 112C (Aug. 2017), http://bit.ly/2Lx7Wo7 (urging that pretrial detention should never occur solely due to an inability to pay).

As the standard-bearer for a profession with a special obligation to safeguard the system of justice, the ABA has a paramount interest in the question presented in this case and can provide the Court a unique and informed perspective on it.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution enshrines equal justice as a core principle of our democracy. The promise of equal treatment without regard to economic status inheres in multiple provisions of the Constitution. Indeed, this Court has treated equal justice as one of the Constitution's cardinal guarantees. Again and again in cases involving the criminal justice system, the Court has elevated the principle of equal justice over considerations of cost, administrative ease, and more potent law enforcement. The Court has guaranteed criminal defendants a lawyer at both the trial and appellate level without regard to ability to pay, barred fees that would prevent access to the courts, and prohibited differential punishments for those who can pay fines and those who cannot.

The Court has also recognized that imposing the same requirements or penalties across the board on defendants presenting a wide array of different circumstances is not equal justice. A million-dollar fine, for example, is unlikely to deprive a very rich person of food, shelter, or livelihood. The same fine—or even one that is orders of magnitude smaller—levied on a poor person who cannot pay it could cast him into an inescapable spiral of debt and imprisonment.

The Excessive Fines Clause should be a bulwark against fines that deny equal justice. The Clause has historically served two functions. First, it has sought to bar fines so disproportionate to the crimes they punish that they entrap defendants into endless cycles of poverty. Second, it has sought to prevent fines so disconnected from individual defendants' ability to pay that they render punishment harsher for poor defendants than for rich ones, potentially rendering the penalty out of proportion to the offense by depriving low-income defendants of food, shelter and livelihood even for relatively minor infractions.

Empirical evidence corroborates how excessive fines undermine equal justice. The evidence demonstrates that excessive fines have a disproportionate impact on the poor, as well as a significantly disparate impact based on race.

This Court has held that a right in the Bill of Rights must be incorporated into the Fourteenth Amendment's Due Process Clause if that right is "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *McDonald v. City of Chicago*, 561 U.S. 742, 760-61 (2010). The Excessive Fines Clause meets that standard. As dis-

cussed below, the historical record shows that equal justice in the imposition of fines—the objective of the Excessive Fines Clause—is deeply embedded in the protections afforded in the criminal justice system. Further, this Court's long insistence on equal treatment in the administration of criminal justice, without regard to financial means, further demonstrates the centrality of equal justice where a defendant's liberty is at stake. Despite this insistence, empirical evidence demonstrates the persistence of inequities in the system of justice, and corroborates that excessive fines disproportionately burden the poor and communities of color. That disparate impact implicates additional guarantees and protections of equal treatment, adding to the combination of attributes that place equal justice at the core of ordered liberty.

No just society should knowingly subject defendants to fines they can never pay and then punish them further for their financial default. Such denials of equal justice, however, are rampant in local courts throughout the country, spawning a renaissance of debtors' prisons—an institution ostensibly abolished as inhumane 170 years ago—to house those who cannot pay the fines imposed upon them. The prohibition on excessive fines, once identified as the Magna Carta's most important guarantee, is increasingly important to safeguard the fundamental right to equal justice.

ARGUMENT

I. It Is a "Fundamental Right" in a Free Society that Justice Be Equal in Substance and Availability, Without Regard to Economic Status

Equal justice without regard to economic status is a cornerstone of the American justice system. *See* Justice Lewis F. Powell, Address at Legal Services Corporation: A Presidential Program of the Annual Meeting of the American Bar Association 2 (Aug. 10, 1976), http://bit.ly/2MAO5K3 ("Equal justice under law is not merely a caption on the facade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists. ... It is ... fundamental that justice should be the same, in substance and availability, without regard to economic status.").

From its fledgling days to the current era, this Court has recognized the centrality of equal justice in the judicial system. John Jay, the first Chief Justice of the United States, wrote on behalf of this Court that, "Justice is indiscriminately due to all, without regard to numbers, wealth, or rank." *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794). The judicial oath, set forth in the Judiciary Act of 1789 (and unchanged in relevant part today) required that judges swear to "administer justice without respect to persons, and do equal right to the poor and to the rich." 1 Stat. 76 § 8; *Marbury v. Madison*, 5 U.S. 137, 180 (1803); 28 U.S.C. § 453. Less than a century later, this Court held that "[n]o duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of f~ e

government." *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897).

The commitment to equal justice has persisted over the 225 years since Chief Justice Jay's observation. Indeed, this Court has increasingly come to understand the many ways in which the principle affects defendants in the criminal justice system.

Thus, this Court has held that an indigent defendant may not be denied the assistance of a lawyer at his trial, *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963), or on direct appeal from conviction, *Douglas v. California*, 372 U.S. 353, 356-58 (1963). Nor may a state preclude a defendant from appealing a conviction or denial of collateral relief solely because of inability to pay a docket fee or similar charge. *Smith v. Bennett*, 365 U.S. 708, 710-13 (1961); *Burns v. Ohio*, 360 U.S. 252, 253-58 (1959). The state also must provide an indigent defendant with a free transcript of trial proceedings to aid in preparing an appeal of a conviction. *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956); *Eskridge v. Wash. State Bd. of Prison Terms & Paroles*, 357 U.S. 214, 214-16 (1958) (per curiam): *Draper v. Washington*, 372 U.S. 487, 497-500 (1963). Moreover, this Court has held that States cannot satisfy this obligation of equal justice by securing nominal assistance of counsel. The assistance must be effective. *See McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U.S. 429, 435 (1988); *Evitts v. Lucey*, 469 U.S. 387, 395-96 (1985); *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

This Court has similarly held that prisoners, perhaps the most economically vulnerable of all

litigants, must have meaningful access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *Procunier v. Martinez*, 416 U.S. 396, 419 (1974); *Younger v. Gilmore*, 404 U.S. 15, 15 (1971) (per curiam); *Johnson v. Avery*, 393 U.S. 483, 483, 485 (1969); *Cochran v. Kansas*, 316 U.S. 255, 257-58 (1942); *Ex parte Hull*, 312 U.S. 546, 549 (1941).

In addition, this Court has implemented the principle of equal justice by barring courts from imposing differential punishments on the basis of economic status. Thus, a State violates the Equal Protection Clause when it imprisons an indigent individual solely because he cannot afford to pay a fine. In *Williams v. Illinois*, the defendant had served his prison sentence, but an Illinois statute required him to remain in jail because he could not pay the monetary penalty of his sentence. 399 U.S. 235, 236-37 (1970). This Court invalidated the statute, holding that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." *Id.* at 244. The Court reasoned that, "[s]ince only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum," and that "[b]y making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons." *Id.* at 242. The very next term, in *Tate v. Short*, the Court extended Williams, holding that Texas violated the Equal Protection Clause when it imprisoned a defendant convicted under a fine-only statute solely

because the defendant was indigent and unable to immediately pay the fine in full. 401 U.S. 395, 398-99 (1971).

Again implementing the principle of equal justice, this Court has held that the State impermissibly discriminates on the basis of financial status when it automatically revokes an individual's probation for failure to pay a fine, without first inquiring into why. *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). "To do [so] would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.*

Thus, no one today would contend that a State or the Federal Government could, consistent with the Constitution, systematically impose greater punishments on the poor than on the rich. Such an intentional disparity would make a mockery of the Constitution's promise of equal protection of the laws. In the imposition of punishments, the state can no more discriminate on account of poverty than on account of religion, race, or creed.

This Court's longstanding and broad-based holdings ensuring effective representation to indigent defendants, providing them access to the courts, and rejecting differential punishments, support the determination that the right to equal justice without regard to economic status is fundamental.

II. A Key Function of the Excessive Fines Clause Is to Ensure Equity in the Imposition of Fines

For nearly 1000 years, the English constitution, and for its shorter lifespan, the American Constitution, have recognized the nexus between

excessive fines and equal justice. From its historical origins, to its embodiment in modern jurisprudence, the protections of the Excessive Fines Clause and its antecedents have turned not only on proportionality of the fine to the offense, but also on its compatibility with the defendant's ability to pay.

By the twelfth century, there existed a pre-Magna Carta English writ known as *de moderata misericordia* under which unjustly large fines could be reduced. Glanvill's treatise (dating to around 1188) states that "[fines] by the lord king ... means that he is to be [fined] by the oath of lawful men of the neighborhood, but so as not to lose any property necessary to maintain his position." Glanvill, *The Treatise on the Laws and Customs of the Realm of England* 114 (G.D.G. Hall ed., 1965).

The Magna Carta (1215) provides: "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood." Frederic Maitland wrote that "[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about [excessive fines]." F.W. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Provisions regarding the calculation of fines, mirroring Magna Carta's were also included in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275), which required "that no City, Borough, nor Town, nor any Man be [fined], without reasonable Cause, and according to the Quantity of his Trespass; that is to say, [according to his ability to pay]."

The Eighth Amendment has its roots in these English sources. It was taken verbatim from a provision of the English Bill of Rights of 1689, which

itself grew out of the language of the Magna Carta. Scholars have therefore recognized the historical link between the Excessive Fines Clause and equal justice. *See, e.g.*, Nicholas M. Mclean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 839-41 (2013). This Court likewise has recognized that link. *See United States v. Bajakajian*, 524 U.S. 321, 335 (1998) (noting that, at the Founding, English constitutional law required that "amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood").

The U.S. Court of Appeals for the First Circuit has viewed the Eighth Amendment in the same light, holding that an individual's ability to pay directly bears on a fine's "excessiveness." *See United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007). In *United States v. Levesque*, the court found that a forfeiture—for current purposes the equivalent of a fine—could be so onerous as to deprive a defendant of his or her future ability to earn a living, thus implicating the historical concerns underlying the Excessive Fines Clause." 546 F.3d 78, 83-85 (1st Cir. 2008). Along similar lines, the Second Circuit has held that "when analyzing a forfeiture's proportionality under the Excessive Fines Clause, courts may consider—in addition to the four factors we have previously derived from *Bajakajian*—whether the forfeiture would deprive the defendant of his livelihood, i.e., his 'future ability to earn a living.'" *United States v. Viloski*, 814 F.3d 104, 111 (2nd Cir. 2016) (quoting *Levesque*, 546 F.3d at 85).

These sources establish that the Excessive Fines Clause requires courts, in imposing fines, to take into account the defendant's ability to pay.

III. Empirical Evidence Confirms that Excessive Fines Undermine Equal Justice

In general, even when not excessive, fines imposed in judicial proceedings have disparate effects on the poor and communities of color. The greater the fines, the more acute and widespread the disparate impacts. Low income defendants are more likely to be unable to pay fines than are higher income defendants. And unpaid fines can result in incarceration, suspension of driver's and occupational licenses, and loss of employment, further impeding the ability to pay and prolonging the penalty imposed for the original offense. As the evidence shows, such financial penalties can render justice unequal.

A. Excessive Fines Disproportionately Burden the Poor

1. *The ABA Has Recognized that Fines, Unless Calibrated to Ability to Pay, Unfairly Burden Defendants of Lesser Means*

Concerned with the burgeoning evidence that fines not linked to ability to pay are denying equal justice to defendants who are poor, the ABA in August 2018 adopted *Ten Guidelines on Court Fines and Fees*. The report accompanying the Guidelines laid out some of that evidence. The report noted, for example, that an estimated 10 million Americans owe more than $50 billion in debts imposed by the criminal justice system. *See* ABA *Guidelines*, Report at 2, http://bit.ly/2NhGzDy. Further, the ABA cited studies showing that nearly two-thirds of current prisoners were assessed court fines and fees, and have little prospect of paying them when they leave prison, as 60 percent remain unemployed a year after release. *Id.*

The commentary to the guidelines debunks the popular misconception that the United States long ago abolished "debtors' prisons." ABA *Guidelines*, Comm. at 3-4. Many current prisoners are incarcerated because they could not pay court fees and fines. Such incarceration has been documented in at least thirteen States since 2010. *Id.* at 4. In several States, the municipal courts that typically administer fine-and-jail systems simply do not make the indigence inquiry necessary to safeguard the constitutional protection *Bearden* provides against incarceration-for-nonpayment. Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 Harv. L. Rev. 1024, 1027-31 (2016). Thus, in some States, courts still revoke or withhold probation based on failure to pay. ABA *Guidelines*, Comm. at 9. Others force defendants to choose between incarceration and paying the fine. *Id.* at 4-5. And still others allow individuals to be arrested and held while they await an ability-to-pay hearing. *Id.* at 5.

The remedies the Guidelines recommend testify to the inequities that the empirical data demonstrate. Thus, the Guidelines urge, among other things, that fines be calibrated to the financial circumstances of the person ordered to pay; that inability to pay (as opposed to willful nonpayment) never result in incarceration, deprivation of fundamental rights, or other disproportionate sanctions; that courts hold mandatory ability-to-pay hearings before imposing a fine; that courts consider alternative sanctions for those unable to pay fines; and that defendants have a right to counsel if incarceration could result from nonpayment of a fine. *See* ABA *Guidelines*, Comm.

Thus, Guideline 2 advises that "[f]ines used as a form of punishment for criminal offenses or civil

infractions should not result in substantial and undue hardship to individuals or their families. ... [A] full waiver of fines should be readily accessible to people for whom payment would cause a substantial hardship." *Id.* at 3. Guideline 3 provides that "[a] person's inability to pay a fine, fee or restitution should never result in incarceration or other disproportionate sanctions." *Id.* at 3. Along the same lines, Guideline 4 states that before sanctioning an individual for nonpayment, "the court must first hold an 'ability-to-pay' hearing, find willful failure to pay a fine or fee the individual can afford, and consider alternatives to incarceration." *Id.* at 7.

ABA recommendations require broad-based consensus from a cross-section of the legal profession. That the ABA adopted these Guidelines signals the dimensions of the problem. And the Guidelines themselves illuminate the inherent inequalities in use of fines as criminal punishments—disparities that cement the link between equal justice and excessive fines.

2. *Scholars Have Also Extensively Documented the Disproportionate Burden that Excessive Fines Impose on the Poor*

Scholars have also noted the disproportionate impact of excessive fines on the poor. For example, through studies and first-person observations, Alexes Harris and co-authors have documented the disproportionate effect of excessive fines on those of lesser economic means. *See* Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 151-56 (2016); Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Sociology 1753, 1778, 1785-86 (2010) (noting that

80% of those interviewed found their criminal debt obligations to be "unduly burdensome").

Beth A. Colgan has similarly provided qualitative accounts of the impacts of excessive fines on poor individuals, *see* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2, 8-9 (2018), and has noted that "municipalities appeared to be targeting low-income and black communities with ... [fine, fee, and imprisonment] practices," Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 Wm. & Mary L. Rev. 1171, 1174-75 (2017). She has also explained how excessive fines and fees entrench poverty. *See* Beth A. Colgan, *Fines, Fees, and Forfeitures*, in 4 Reforming Criminal Justice: Punishment, Incarceration, and Release 205, 212-16 (Erik Luna ed. 2017), http://bit.ly/2od5ERW.

A 2007 report commissioned by the Council of State Governments Justice Center and funded by the federal Bureau of Justice Assistance similarly corroborated the extraordinary impact of excessive fines on the economically vulnerable. The report found that "[m]any people released from prisons and jails have a substantial amount of debt to repay, including supervision fees, court costs, victim restitution, and child support," but that "[p]eople released from prisons and jails typically have insufficient resources to pay their debts." Rachel L. McLean & Michael D. Thompson, *Repaying Debts* 7-8 (2007), http://bit.ly/2wi2lNB. That is because, "[n]ationally, two-thirds of people detained in jails report annual incomes under $12,000," and "[m]ost people returning to the community have difficulty finding employment upon release from incarceration, and they often rely on their families for support." *Id.*

Thus, "[v]ictims, families, and criminal justice agencies often compete for a share of the small payments people released from prisons and jails are able to make." *Id.*

A 2015 report by the White House Council of Economic Advisors reached many of the same conclusions. *See* Council of Economic Advisers Issue Brief, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor* 3-4 (Dec. 2015), http://bit.ly/2oexSff. The report noted that fines and fees "serve as a regressive form of punishment as the same level of debt presents an increasingly larger burden as one moves lower on the income scale." *Id.* The report observed further that "[f]ines and fees create large financial and human costs, all of which are disproportionately borne by the poor." *Id.*

B. Excessive Fines Disproportionately Burden Communities and Persons of Color

1. The ABA Has Recognized the Disparate Impact Excessive Fines Have on Minority Communities

One of the foundations for the ABA's Guidelines was the determination that fines and fees fixed without regard to whether a person reasonably can pay them "are regressive and have a disproportionate, adverse impact on low-income people and people of color." ABA *Guidelines*, Comm., at 5 & n. 18. The disproportionate racial and ethnic impact arises because of, among other things, the continuing disparity in income and wealth based on race and ethnicity, higher rates of poverty and unemployment among minorities, and persistent racial discrimination. Statistics show, for example, a disproportionate number of driver's license

suspensions in communities of color for nonpayment of fines. *See id.* Often, individuals need to drive in order to work. The disparate number of license suspensions contributes to higher unemployment among minorities, and to a higher incidence of convictions for driving with a suspended license, which carries even greater penalties. These disparities have resulted in waning trust in the justice system, particularly in communities of color, and hostile or even explosive relationships between lower income, minority communities and the police.

2. *Other Sources Have Also Documented Racial and Ethnic Disparity in the Imposition and Enforcement of Fines*

Other groups have also demonstrated the disproportionate racial impact of fines and fees on minority communities.

A report by "Back on the Road California," a coalition of California civil-rights organizations, found, through analysis of public records from the California Department of Motor Vehicles and U.S. Census data, that, in California, "there are dramatic racial and socioeconomic disparities in driver's license suspensions and arrests related to unpaid traffic fines and fees." Back on the Road California, *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California* 1, 22-24 (2016), http://bit.ly/2PISx7M. As the report documented, "data collected from 15 police and sheriff's departments across California show that Black motorists are far more likely to be arrested for driving with a suspended license for failure to pay an infraction citation than White motorists." *Id.* at 1.

The Brennan Center for Justice, a non-partisan public policy and law institute that focuses on

fundamental issues of democracy and justice, found that "African-Americans face a particularly severe burden" from the imposition of fines and fees. Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 4 (2010), http://bit.ly/2MS7TIm. In particular, because in at least seven States, individuals must pay off criminal justice debt before they can regain their eligibility to vote after a conviction, criminal justice debt disproportionately disenfranchises African-Americans. *See id.* at 29.

The ACLU of Pennsylvania, after a months-long investigation, found pronounced racial disparities in civil forfeiture practices in Philadelphia. According to the study, "[a]n estimated 7 out of 10 people whose cash is taken by Philadelphia law enforcement agencies *even though they have not been convicted of a crime* are African-American." ACLU of Pennsylvania, *Guilty Property* 10 (2015), http://bit.ly/2PFet3s (emphasis in original).

The Center for American Progress, a non-profit organization in Washington, D.C., found that "people of color are disproportionately impacted by civil asset forfeiture." Center for American Progress, *Forfeiting the American Dream* 5 (2016), http://bit.ly/2PJDzhR. The Center reported that people of color appear to bear the brunt of civil asset forfeiture in States and cities across the United States. *See id.*

3. *The Department of Justice Has Similarly Identified Excessive Fines as a Significant Burden for Communities of Color*

The Department of Justice investigation in Ferguson, Missouri, also identified significant racial disparities in the imposition of fines and fees. Originally intended as an investigation into a police shooting of an African-American teenager, the DOJ

investigation produced a 105-page report on the City's allegedly exploitative, excessive system of fines. *See* United States Department of Justice Civil Rights Division, *Investigation of the Ferguson Police Department*, 2, 3, 9, 10, 13 (Mar. 4, 2015), http://bit.ly/2ofK7bu; *see also* United States Department of Justice Civil Rights Division, *Dear Colleague Letter*, 2 (Mar. 14, 2016), http://bit.ly/2O4LlkV (reminding state and local law enforcement agencies, in the wake of the Ferguson report, that practices related to the imposition of fines may "violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, when they unnecessarily impose disparate harm on the basis of race or national origin").

4. Excessive Fines Have a Sordid History as Tools of Racial Oppression

Excessive fines were used as tools in the post-Reconstruction and Jim Crow South to subordinate African-Americans. As one letter writer stated succinctly in a 1942 letter to the NAACP,

> the general practice of white land lords down here is to go into the county courts that meet in the spring of the year and 'bail out' all available Negroes 'convicted' of petty crimes, pay their fines, and have them placed into their custody and work them as long as they choose.

Letter from Thomas Monroe Campbell, Tuskegee Institute, Alabama, to George C. Schuyler, NAACP (Mar. 3, 1942). George McCutcheon McBride wrote in the entry on "Peonage" in the 1934 *Encyclopedia of the Social Sciences*, that

> [a]s a penalty for vagrancy or petty crimes, especially when committed by Negroes, it

> became customary in many districts to impose a fine and to accept payment of this fine from some employer of labor, who in return secured the services of the culprit until the amount of the fine had been worked out. It was not difficult to bring about the accumulation of other debts by excessive charges for tools, food, lodgings and clothing advanced to the victim. Thus a system of long continued, if not permanent, involuntary servitude developed.

Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 Stan. L. Rev. 254, 269-70 (1963) (quoting George McCutcheon McBride, *Peonage*, in 12 *Encyclopedia of the Social Sciences* 69, 71 (1934)).

Those Jim Crow practices had roots in the period immediately following Reconstruction, where "minor breaches of sometimes vague laws made the [fine and fee] system a device for controlling blacks, whose omnipresence as free persons was found offensive by many whites." Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910*, 70 Chi.-Kent L. Rev. 439, 468 (1994). Scholars of the post-Reconstruction South have documented how excessive fines, among other excessive punishments, were enacted in that period for the purpose of racial oppression. *See* Douglas Blackmon, *Slavery by Another Name* 53-57, 63-69 (2008); Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 198-205 (1988).

IV. The Excessive Fines Clause Protects the Fundamental Right to Equal Justice

This Court has engaged in "selective incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. The standard for incorporation is whether the right is "implicit in the concept of ordered liberty," and "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McDonald v. City of Chicago*, 561 U.S. 742, 760 (2010); *see Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The Excessive Fines Clause plays an essential role in protecting equal justice.

This Court has recognized that protecting equal justice without regard to economic status is a key function of the Fourteenth Amendment. As shown in Part I, *supra*, in case after case this Court has recognized fundamental rights—such as access to courts and counsel, and protection from differential punishments on the basis of economic status—that are themselves merely instrumental to the preservation of equal justice. Those cases recognize that equal justice, without regard to economic status, is an indispensable component of ordered liberty. *See Bearden*, 461 U.S. at 666-69; *Gideon*, 372 U.S. at 343-45.

The Excessive Fines Clause is an essential safeguard of equal justice. As shown in Part II, *supra*, for nearly a millennium an important aim of the Excessive Fines Clause has been to ensure equal justice by requiring that a fine be proportional to the offense *and* that it not exceed a defendant's ability to pay. Moreover, as shown in Part III, *supra*, there is

an overwhelming practical link between excessive fines and equal justice. Empirical evidence shows that fines not calibrated to ability to pay have had a disparate impact on both the poor and communities of color, in derogation of equal justice.

Finally, the well-documented pervasive, nationwide racially disparate impact of excessive fines is further proof of its necessity in ensuring equal justice. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). "Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it." *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879). To be sure, this Court has generally focused its constitutional inquiry on whether a law has a racially discriminatory purpose. *See Washington v. Davis*, 426 U.S. at 239. But here, where the question is not whether to invalidate a law but whether to incorporate a constitutional right into the Due Process Clause, the calculus is different. Whether or not the disparate racial impact of excessive fines would be unconstitutional otherwise, the disparity adds another level—one of unique historical, legal, and sociological import—to the impairment of equal justice due to excessive fines. This evidence is another important building block in establishing the centrality of the Excessive Fines Clause in the concept of ordered liberty.

CONCLUSION

Amicus curiae the American Bar Association respectfully urges that the Court reverse the decision below.

Respectfully submitted,

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SEPTEMBER 11, 2011

No. 17-1091

In the Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE R STREET INSTITUTE, THE FINES AND FEES JUSTICE CENTER, AND THE SOUTHERN POVERTY LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are non-profit organizations that share a common concern that state and local governments pursue criminal and civil fines, fees, and forfeitures at alarmingly high rates. Amici have a particular interest in this case because the unprecedented rise in fines, fees, and forfeitures has generated financial incentives for abuse, undermined public safety, and has had devastating impacts on low-income people, their families, and society at large. Amici believe the protections of the Eighth Amendment's Excessive Fines Clause are urgently needed to guard against these harms, and write to encourage this Court to hold that the Excessive Fines Clause is enforceable against the States to ensure that people in Indiana, like people elsewhere in the country, enjoy the full protections granted to them by the Eighth Amendment.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization of more than 1.6 million members dedicated to defending the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws. Founded more than 90 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of constitutional rights, both as direct counsel and as amicus curiae. Through its Racial

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[1] All parties have consented to the filing of this brief. Amici affirm that no counsel for any party authored this brief in whole or in part and that no person other than amici made a monetary contribution to its preparation or submission.

Justice Program, the ACLU engages in nationwide litigation and advocacy to enforce and protect the constitutional rights of impoverished people against unlawful fine, fee, and forfeiture practices.

The R Street Institute is a non-profit, non-partisan, public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

The Fines and Fees Justice Center ("FFJC") is a national center for advocacy, information, and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees in state and local courts. FFJC's mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably.

The Southern Poverty Law Center ("SPLC") has provided pro bono civil rights representation to low-income persons in the Southeast since 1971, with particular focus on combating unlawful discrimination and ending poverty. The SPLC provides educational materials, engages in policy reform, and develops litigation to minimize the burdens placed on the poor, to ensure meaningful access to social safety nets, and to enable upward mobility.

SUMMARY OF THE ARGUMENT

Whether the Excessive Fines Clause of the Eighth Amendment is incorporated against the States is a matter of vital importance to millions of Americans across the country. Amici agree with the

petitioners that the right to be free from excessive fines, like the rights to be free from excessive bail and cruel and unusual punishment, is deeply rooted in American traditions. This right should be incorporated through the Fourteenth Amendment to apply to the States, as most lower courts have already held. In this brief, amici seek to provide concrete data about the growth in exorbitant fines, fees, and forfeitures across the country—and the resulting abuse, harms to public safety, and detrimental impact on individuals, families, and society at-large. Until this Court declares that right incorporated, this important check will be unavailable against state and local practices in those jurisdictions that have declined to incorporate its protections.

The United States has experienced an unprecedented and extraordinary rise in fines, fees, and forfeitures over the past three decades. Driven by a quest to generate revenue and to fund state and local justice systems, the explosion of fines, fees, and forfeitures has buried people under mountains of accumulating debt. Because poor and low-income people often cannot immediately pay steep fines and fees or sustain asset forfeiture, these economic burdens can severely disrupt their ability to provide for themselves and their families, and lead to a host of collateral harms—wage garnishment, loss of employment and housing, poor credit ratings, driver's license suspension, incarceration, prohibitions on the right to vote, and even family separation. The increasing use of fines, fees, and forfeitures to generate revenue also perverts the goals of the justice system. Financial incentives driving the use of these penalties contribute to abuse

and undermine reintegration of people involved in the criminal justice system into families and communities.

Though not all of these practices would rise to the level of a violation of the Excessive Fines Clause, the clause represents an essential safeguard against severe monetary sanctions and asset seizures. Properly construed, the clause requires consideration of both the gravity of the offense and whether a monetary sanction or forfeiture will deprive individuals of their livelihood. Incorporation of the Excessive Fines Clause is necessary to check abuse of fines, fees, and forfeitures throughout the country.

ARGUMENT

I. STATE AND LOCAL COURTS AND LAW ENFORCEMENT HAVE DRAMATICALLY INCREASED FINES, FEES, AND FORFEITURES IN ORDER TO RAISE GOVERNMENT REVENUE AND FUND JUSTICE SYSTEMS.

Today millions of people nationwide face debilitating financial burdens from civil and criminal fines, fees, and forfeitures. As of 2017, 10 million people owed more than $50 billion in criminal fines, fees, and forfeitures alone.[2] Several sources contribute to this burgeoning debt: "fines" imposed as

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[2] Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create*, Harvard Kennedy School & Nat'l Inst. of Justice 5 (Jan. 2017), https://www.ncjrs.gov/pdffiles1/nij/249976.pdf.

punishment for an offense at any level—whether a civil or criminal infraction, misdemeanor, or felony;[3] "fees" that seek to raise revenue or recoup government costs from people sentenced for civil or criminal infractions, misdemeanors, or felonies;[4] and civil forfeitures, which allow seizure of property or assets without formal criminal charges being filed against the property owner.[5] The dramatic rise in these financial penalties is fueled by powerful incentives to raise revenue for government coffers and to recoup the costs of government services from people involved in the justice system. The Excessive Fines Clause has a crucial role to play in checking the abuses that this conflict of interest can prompt.

The past three decades have witnessed a striking expansion in state and local governments' reliance on fines and fees to generate public revenue. Since 2010, 48 states have increased civil and

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[3] *Id.* at 2.

[4] The term "fees" includes "surcharges" and "litigation taxes"—financial obligations consisting of either a flat fee or a percentage added to fines or fees to fund a particular government function or raise general revenue. *See* Harvard Law School Criminal Justice Policy Program, *Confronting Criminal Justice Debt: A Guide for Policy Reform* 6, (September 2016), http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf (describing surcharges); *see, e.g.*, Tenn. Code Ann. § 67-4-602 (2016) (describing various litigation taxes).

[5] *See* Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 5 (Inst. for Just. 2d ed. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf.

criminal fees.[6] Arizona, Louisiana, Ohio, and Texas instituted new fees and raised existing fees to address 2010 budget shortfalls.[7] In 2012, the Tennessee legislature established a $450 criminal record expungement fee for the principal purpose of raising revenue for the state general fund.[8] In California, the fine for a red light violation is only $100, but $390 in additional fees are imposed[9] and distributed among 18 different state and county funds ranging from the Fish and Game Preservation Fund to the Emergency Medical Transportation Fund.[10]

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[6] Joe Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors' Prisons*, National Public Radio (May 21, 2014, 5:01 AM), https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons (describing results of yearlong investigation).

[7] *Shackled to Debt*, *supra* note 2, at 6 (internal citation omitted).

[8] Maura Ewing, *Want to Clear Your Record? It will Cost You $450*, The Marshall Project (June 1, 2016), https://www.themarshallproject.org/2016/05/31/want-to-clear-your-record-it-ll-cost-you-450#.8JBZ1nHWG.
Tennessee legislators sought to raise $7 million by directing 55% of the proceeds of each criminal records expungement fee to the state general fund. *Id.*

[9] Super. Ct. of Cal., Cty. Of San Diego, *How the Amount Due is Calculated on Citations*, SCSD ADM-295 (April 2013), http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/GENERALINFORMATION/FORMS/ADMINFORMS/ADM295.PDF.

[10] California State Auditor Report 2017–126, *Penalty Assessment Funds: California's Traffic Penalties and Fees Provide Inconsistent Funding for State and County Programs and Have a Significant Impact on Drivers* 5 (April 2018), https://www.bsa.ca.gov/pdfs/reports/2017-126.pdf (describing

Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue. In 2017, New Jersey municipal courts collected more than $400 million in fines and fees, with more than half of that amount funneled to the general funds of municipalities and a significant portion directed to state and county governments.[11] Similarly, in 2016, more than half of the $167 million raised by Arizona municipal courts in fines and fees funded general municipal operations.[12] Among the 100 cities in the United States that generated the highest proportion of municipal revenue from fines and fees in 2012, between 7.2% and 30.4% of total municipal revenue was derived from fine and fee collection.[13] In comparison, during the previous year,

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fees imposed on top of traffic offenses encompassing red light violation and where fee revenue is directed).

[11] New Jersey Courts, *Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees*, 12 (June 2018), https://www.njcourts.gov/courts/assets/supreme/reports/2018/sccmcoreport.pdf.

[12] Mark Flatten, *City Court: Money, Pressure and Politics Make it Tough to Beat the Rap*, Goldwater Institute, 6–7 (2017) (reporting that "[r]oughly half" of the $166.7 million raised by Arizona municipal courts in 2016 was directed to municipal general funds to "support general city operations").

[13] Dan Kopf, *The Overlooked Reason Why Some Cities Have Strained Relationships With Cops*, Business Insider (July 11, 2016, 10:01 AM), https://www.businessinsider.com/reason-for-strained-relationship-with-police-2016-7 (discussing data from the 2012 U.S. Census of Governments: State and Local Finances).

Ferguson, Missouri—a town that has received nationwide attention for municipal court practices driven by a quest for revenue—relied on fines and fees for 13% of its general fund revenue.[14]

Criminal justice fees have skyrocketed to pay for an expanding justice system by collecting money from those prosecuted or punished. Since the 1980s, public funding for courts has decreased while the number of people involved in the criminal legal system has ballooned. In 1986, the Conference of State Court Administrators noted the proliferation of "[f]ees and miscellaneous charges . . . as [a] method to meet demands for new programs without diminishing general tax revenues."[15] Many state court systems witnessed a 10% to 15% reduction in funding from 2007 to 2010 as a result of budget cuts.[16] In Georgia, court funding fell by 25% from 2009 to 2011.[17] At the same time, between 1980 and

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[14] Civil Rights Division, U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 9 (2015) (hereinafter "Dep't of Justice Ferguson Report"), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[15] Conference of State Court Administrators, *Standards Relating to Court Costs: Fees, Miscellaneous Charges and Surcharges and a National Survey of Practices*, 4–5 (June 1986), https://cdm16501.contentdm.oclc.org/digital/collection/financial/id/81.

[16] American Bar Association, Resolution 302 and Report 2 (Aug. 8–9, 2011), https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_302.authcheckdam.pdf.

[17] *Id.* at 3.

2005, the number of incarcerated people in the United States increased from 500,000 to 2.2 million people.[18] The number of people on parole or probation also swelled from 1.34 million in 1980 to 4.95 million in 2005.[19]

Fees are being used to bridge the gulf between diminished public funding and the costs of an expanding justice system. Courts and related state and local agencies collect a wide variety of fees, including court costs and "user fees," which seek to recoup outlays for everything from warrant issuance, jail booking, and public defenders, to probation and incarceration.[20] For example, Florida imposes a "prosecution fee" ranging from $50 to $100 or more on all criminal cases, which is used to fund State Attorney's offices.[21] As of 2014, over 40 states charged public defender fees.[22] Numerous states

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[18] Pew Charitable Trust Public Safety Performance Project, *Public Safety, Public Spending: Forecasting America's Prison Population 2007–2011*, at 2 (2007), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/state-based_policy/psppprisonprojections0207pdf.

[19] *Id.*

[20] Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice 7 (2010), https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf.

[21] *See* Fla. Stat. Ann. § 938.27(8) (mandating prosecution fee of at least $50 for misdemeanor and traffic offenses and at least $100 for felony offenses).

[22] NPR, Brennan Center for Justice & National Center For State Courts, *State-By-State Court Fees*, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees.

impose defender fees even if charges are dismissed or the defendant is acquitted.[23] By statute, Michigan's county courts rely almost entirely on user fees to fund day-to-day expenses.[24] In New Orleans, "[r]evenue from fees helps to fund the municipal and district courts, the district attorney, public defender, and sheriff's office, and other agencies . . . ."[25] A 2007 report recognized that "[a]dministrative assessments on citations fund nearly all of the Administrative Office of the Court's budget in Nevada [and] . . . [i]n Texas, probation fees made up 46% of the Travis County Probation Department's $18.3 million budget in 2006."[26]

Forfeitures by state and local law enforcement have also boomed nationwide. The total amount seized in forfeitures "across 14 states more than doubled from 2002 to 2013."[27] Many seizures come out of civil asset forfeiture programs in which the government secures forfeiture without first obtaining

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[23] *See, e.g.*, N.H. Rev. Stat. § 604-A:9 (2018); Ala. Code 1975 § 15-12-21 (2018).

[24] Kahryn Riley, *Michigan's Trial Courts Have a Major Funding Problem*, Mackinac Center for Public Policy (August 10, 2018), https://www.mackinac.org/michigans-trial-courts-have-a-major-funding-problem.

[25] Mathilde Laisne et al., *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans*, Vera Institute for Justice (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/past-due-costs-consequences-charging-for-justice-new-orleans/legacy_downloads/past-due-costs-consequences-charging-for-justice-new-orleans.pdf.

[26] *Shackled to Debt*, *supra* note 2, at 6.

[27] Carpenter, *supra* note 5, at 5.

a conviction, and at times without even filing criminal charges.[28] Most state civil forfeiture laws "give law enforcement agencies a financial stake in forfeitures by awarding them some, if not all, of the proceeds."[29] The U.S. Department of Justice's Equitable Sharing Program pushes forfeitures rates even higher by allowing participating local law enforcement agencies to team up with federal authorities and skirt more restrictive state laws in order to retain up to 80% of proceeds from forfeited assets.[30] Between 2000 and 2013, annual payments from the program to state and local law enforcement more than tripled—with a total of $4.7 billion paid to state and local agencies.[31]

II. UNCHECKED FINES, FEES, AND FORFEITURES PROFOUNDLY HARM IMPOVERISHED AND LOW-INCOME INDIVIDUALS, FAMILIES, AND COMMUNITIES.

One reason state and local governments have shifted from generally applicable taxes to fines, fees, and forfeitures to raise revenue is that the latter are easier to implement, precisely because they are

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[28] Karis Ann-Yu Chi, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 Cal. L. Rev. 1635, 1673 (2002). From 1997 to 2013, federal civil forfeitures outpaced criminal forfeitures, which require a criminal conviction to deprive people of their property. Carpenter, *supra* note 5, at 5.

[29] *Id.* at 11.

[30] *Id.* at 6.

[31] *Id.*

concentrated on the most vulnerable—and least politically powerful—individuals and communities. These sanctions have driven people deeper into cycles of poverty, debt, and continued criminal justice involvement. Those who cannot immediately pay often incur additional penalties, court summons, collection efforts, driver's license suspension, and even incarceration.[32] These burdens can amount to the loss of livelihood that the Excessive Fines Clause was designed to forestall.

The majority of people involved in the criminal justice system are indigent and unable to pay the fines and fees that jurisdictions impose.[33] Fines that are manageable for a person of means may be out of reach for an impoverished or low-income person. The piling on of additional fees leads to financial burdens that may be impossible to meet even for a moderate-income person. In New Jersey, for example, the offense of simple marijuana possession carries a $100 fine, but will ultimately lead to the imposition of $1,008 in fines and fees on an indigent person represented by a public defender, due to the addition

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[32] Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US systems of Justice*, 1 Annual Review of Criminology 471 (2018).

[33] *See* Bureau of Justice Assistance, U.S. Dep't of Justice, *Contracting for Indigent Defense Services: A Special Report* 3 n.1 (2000), https://www.ncjrs.gov/pdffiles1/bja/181160.pdf (estimating that 60% to 90% of criminal cases nationwide involve indigent defendants); Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 Criminology & Pub. Pol. 509, 516 (2011), http://criminology.fsu.edu/wp-content/uploads/volume-10-issue-31.pdf ("Criminal defendants are overwhelmingly poor...").

of a $200 public defender application fee, $33 in court costs, and $675 in fees for specific government funds.[34] A full-time minimum wage worker in New Jersey grosses only $344 per week and would need to work almost a month just to pay that sum.[35]

When faced with excessive fines and fees, impoverished and low-income people are often forced to make impossible choices between meeting basic needs and making payments to avoid further penalties.[36] In Georgia, Thomas Barrett, an indigent man, was sentenced to pay $200 in fines and fees, serve twelve months of probation, wear an ankle monitor, and pay $360 in monthly monitoring fees—

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[34] New Jersey Courts, *supra* note 11, at 12 (reporting that $675 in additional fees consists of a $500 fee for the Drug Enforcement and Demand Reduction Fund, a $50 lab fee, a $50 fee for Victims of Crime Compensation, and a $75 fee for the Safe Neighborhood Services Fund).

[35] Minimum wage in New Jersey is currently $8.60/hour, which corresponds to $344 in income for a 40-hour work week. *See* SNJ Today Staff, *New Jersey Minimum Wage Set to Increase in 2018*, SNJ Today (May 30, 2018, 5:35 PM), http://www.snjtoday.com/story/37160834/new-jersey-minimum-wage-set-to-increase-in-2018 (reporting New Jersey 2018 hourly minimum wage).

[36] Sarah Stillman, *Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit from Injustice?*, The New Yorker (Jun. 23, 2014), https://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc (in survey of sixty people on private probation, "[t]he vast majority of respondents had forgone rent, groceries, medicine, or all three to pay fees to private-probation firms").

all for stealing a $2 can of beer.[37] Mr. Barrett sold his blood plasma each month, skipped meals, and regularly went without laundry detergent and toilet paper, but still could not meet his monthly payment obligations.[38]

Impoverished and low-income people who cannot immediately pay fines and fees often incur significant additional financial penalties—collection fees, interest, non-payment fees, per-payment fees, payment plan set-up fees, probation fees, and warrant fees—that rapidly cause already unmanageable burdens to multiply into impossible sums.[39] Florida allows private debt collectors to charge a 40% surcharge for unpaid fines and fees.[40] Private companies frequently charge $35 to $50 each month to collect money from people on so-called "pay only probation"—probation imposed solely for fine and fee collection.[41] James Fisher of Colorado, an indigent man who struggled with homelessness and unsteady work, was charged $1680 in collection fees stemming from an initial $678 in fines imposed in 2012 for two open container tickets and a citation for

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[37] Human Rights Watch, *Profiting from Probation: America's "Offender-Funded" Probation Industry* 34 (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf.

[38] *Id.*

[39] Alexes Harris et al., *Monetary Sanctions in the Criminal Justice System*, Monetary Sanctions 14 (April 2017), http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf.

[40] *See* Fla. Stat. Ann. § 28.246(6) (2013).

[41] Human Rights Watch, *supra* note 37, at 27.

driving without proof of insurance.[42] Even after Mr. Fisher made 19 separate payments over four years totaling $1498—more than double the initial fines—he still owed $860 in fees.[43]

Excessive fines and fees often lead to disastrous consequences. They can damage credit scores and directly compromise access to credit, rental housing, mortgages, automobiles, and employment.[44] They can lead to civil judgments that result in liens, wage garnishment, and tax rebate interception.[45] Garnishment and tax interception, in turn, can dissuade employers from hiring people subjected to such restrictions.[46] Excessive fines and fees can also push impoverished people and their families deeper into poverty by excluding them from public benefits. In many states, failure to pay fines

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[42] *Debtors' Prison Settlement: Aurora Cancels Debt, Withdraws Warrants, and Repays James Fisher for Excessive Payments to Municipal Court*, ACLU of Colorado (Jan. 13, 2017), https://aclu-co.org/debtors-prison-settlement-aurora-cancels-debt-withdraws-warrants-repays-james-fisher-excessive-payments-municipal-court/.

[43] *Id.*

[44] Martin, *Monetary Sanctions: Legal Financial Obligations*, *supra* note 32, at 475. Credit agencies learn of these debts through direct reports by courts and government entities and entry of civil judgments to collect unpaid fines and fees. *Id.*

[45] Bannon et al., *supra* note 20, at 27 (reporting that at least fifteen states permit garnishment of wages, bank accounts, or liens to collect fines and fees imposed in criminal cases, and several states use tax rebate interceptions for collection).

[46] Beckett & Harris, *supra* note 33, at 518 (2011).

and fees is a basis for revoking probation or parole,[47] which under federal law renders a person ineligible for federal Temporary Assistance to Needy Families funds,[48] as well as Food Stamps,[49] low-income housing and housing assistance,[50] and Supplemental Security Income for elderly and disabled people.[51] In one state, efforts to collect fines and fees have even led to water and electricity being cut off for people unable to pay.[52]

One of the most devastating results of excessive fines and fees is driver's license suspension, which affects millions of people nationwide.[53] In at least 39 states and the District of Columbia, statutes either require or permit driver's license suspension as a sanction for nonpayment, frequently without any hearing or opportunity to demonstrate inability

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[47] Bannon et al., *supra* note 20, at 28.

[48] 42 U.S.C. § 608(a)9(A) (2012).

[49] 7 U.S.C. § 2015(k)(1) (2015).

[50] 42 U.S.C. § 1437d(l)(9) (2013).

[51] 42 U.S.C. § 1382(e)(4)(A)(ii) (2018).

[52] *SCHR Continues to Challenge LaGrange, GA, Policies That Restrict Access to Basic Utility Services*, Southern Center for Human Rights (March 26, 2018), https://blog.schr.org/2018/03/26/schr-continues-to-challenge-lagrange-ga-policies-that-restrict-access-to-basic-utility-services/ (discussing lawsuit against municipal policy conditioning access to utilities to payment of municipal court fines and fees).

[53] *See* Mario Salas & Angela Ciolfi, *Driven By Dollars: A State-by-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt*, Legal Aid Justice Center 1 (2017), https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf.

to pay before the suspension.[54] People prohibited from driving often lose their ability to work, access medical care, and provide for their families.[55] Driver's license suspension can place individuals in the untenable position of either unlawfully driving or losing their jobs—and may subject them to re-incarceration, because driving on a suspended license is itself often a jailable offense.[56]

Across the country, people are incarcerated for inability to pay state and local fines and fees,[57]

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[54] As of fall 2017, 43 states and the District of Columbia had statutes that required or permitted driver's license suspension for nonpayment of court fines and fees. *See id.* (providing state-by-state analysis). Since then, the practice has been terminated in California, Maine, Mississippi, and Tennessee. *See* Reis Thebault, *In D.C. No More License Suspensions for Drivers With Unpaid Tickets*, Wash. Post (July 12, 2018), https://www.washingtonpost.com/local/dc-politics/in-dc-no-more-suspensions-for-drivers-with-unpaid-tickets/2018/07/12/a72cf13a-85e0-11e8-8553-a3ce89036c78_story.html?utm_term=.b37244c13f1d (describing end of driver's license suspensions for nonpayment of court fines and fees through legislation in Maine, by lawmaker action in California and Mississippi, and by federal court order in Tennessee).

[55] *See* Salas & Ciolfi, *supra* note 53, at 3; *Fowler v. Johnson*, No. 17-11441, 2017 WL 6540926, at *2 (E.D. Mich. Dec. 17, 2017) (finding that "the loss of a driver's license, particularly in a state like Michigan lacking an efficient and extensive public transportation system, hinders a person's ability to travel and earn a living").

[56] *See* Salas & Ciolfi, *supra* note 53, at 6 (discussing prolonged court involvement resulting from initial driver's license suspension for nonpayment of fines and fees); Martin, *Monetary Sanctions: Legal Financial Obligations*, *supra* note 32, at 475.

[57] American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (October 2010), https://

despite *Bearden v. Georgia*, 461 U.S. 660, 667–68 (1983), which held that this practice violates due process and equal protection. Since 2010, incarceration for unpaid fines and fees without predeprivation ability-to-pay hearings has been documented in at least fifteen states: Alabama, Arkansas, Colorado, Georgia, Louisiana, Maine, Michigan, Mississippi, Missouri, New Hampshire, Ohio, South Carolina, Tennessee, Texas, and Washington. *See* Appendix A. Those who are incarcerated for fines and fees they cannot afford suffer gravely. In 2016, Twanda Marshinda Brown, an indigent South Carolina mother, fell behind on payments toward fines and fees for driving on a suspended license when the paychecks issued by her employer bounced.[58] Shortly after securing a new job, Ms. Brown was jailed for 57 days because she could not immediately pay $1900.[59] While incarcerated, Ms. Brown lost her job, incurred additional debt, and feared that her 13-year-old son would be taken by child welfare services.[60]

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www.aclu.org/files/assets/InForAPenny_web.pdf (documenting incarceration for unpaid fines and fees in Michigan, Ohio, Georgia, Louisiana, and Washington).

[58] *Brown v. Lexington County, South Carolina*, No. 3:17-cv-1426-MBS, 2018 WL 1556189, *2 (D.S.C. Mar. 29, 2018); Class Action Second Amended Complaint at 41–45 ¶¶ 137–39, 145, 159–61, *Brown v. Lexington County*, South Carolina, No. 3:17-cv-1426-MBS, (D.S.C. filed June 1, 2017), ECF No. 1.

[59] *Id.* at 45–46 ¶ 164–71.

[60] Twanda Marshinda Brown, *I Was Taken From My Family and Jailed for 57 Days Because I Am Poor*, American Civil Liberties Union (June 1, 2017), https://www.aclu.org/blog/smart

The dramatic rise in fines and fees has undermined exercise of the right to vote. Certain states, including Georgia, require payment of all outstanding court fines and fees before a person convicted of a felony can regain the ability to vote.[61] In Washington, nonpayment of fines and fees can lead to a revocation of voting rights.[62] And in Missouri, Illinois, and New York, people are prohibited from voting while on probation or parole—even if supervision is continued solely to collect fines and fees.[63]

Financial penalties, garnishment, liens, driver's license suspensions, incarceration, and associated loss of employment and wages burden not only the individuals directly affected, but also family members who rely on them for financial support. For example, Washington State authorizes garnishment of up to 25% of the earnings of the spouse of a person with fine or fee debt and seizure of jointly held bank assets, home equity, and tax refunds.[64] These measures reduce overall family income and can harm children's well being.[65]

-justice/sentencing-reform/i-was-taken-my-family-and-jailed-57-days-because-i-am-poor.

[61] Harris, *Monetary Sanctions in the Criminal Justice System*, *supra* note 39, at 14.

[62] *Id.*

[63] *Id.*

[64] Beckett & Harris, *supra* note 33, at 523 (internal citation omitted).

[65] Lawyers' Committee for Civil Rights et. al., *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in*

Forfeitures, like fines and fees, can also have detrimental consequences for individuals, their families, and communities. Forfeiture practices often "target the poor and other groups least able to defend their interests in forfeiture proceedings."[66] A forfeiture may deprive people of cash needed for basic necessities, a vehicle used for transport to work or school, or even the roof over their heads.[67] Poor and low-income people are "often the most burdened by forfeiture" because "[t]hey are more likely to use cash than alternative forms of payment, like credit cards" and "are more likely to suffer in their daily lives while they litigate for the return of a critical item of property . . . ."[68]

Fines, fees, and forfeitures often disproportionately harm communities of color for reasons that include the longstanding racial and ethnic wealth gap[69] and higher rates of poverty and

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California 21 (2016), https://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf (describing harm to children living in families below 50% of the federal poverty level).

[66] *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

[67] *See* Sarah Stillman, *Taken*, The New Yorker (Aug. 12 and 19, 2013), https://www.newyorker.com/magazine/2013/08/12/taken (discussing individual cases).

[68] *Id.*

[69] A 2013 Pew Research Center study of federal data found that the median wealth of white households was 13 times the median wealth of black households, and 10 times the median wealth of Latino households. *See* Rakesh Kochhar & Richard

unemployment.[70] In many jurisdictions, Black people disproportionately experience driver's license suspensions for nonpayment of fines and fees.[71] Such racial disparities contribute to tension between communities of color and law enforcement, as documented in a 2015 Justice Department report.[72] Forfeiture practices can also have a disproportionate impact on communities of color. A federal lawsuit challenging the forfeiture program of the east Texas town of Tenaha and Shelby County, for example, exposed police targeting of racial and ethnic minorities.[73] In 2015, 64% of forfeitures stemming from criminal charges in Alabama concerned Black

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Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, Pew Research Center (Dec. 12, 2014), http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-greatrecession.

[70] In 2014, the Pew Research Center found that Black and Latino people were, on average, at least twice as likely to be poor than were white people in the United States. *See On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, Pew Research Center (June 27, 2016), http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/.

[71] Back on the Road California et al., *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California* 27 (2016), http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf.

[72] *See* U.S. Dep't of Justice Ferguson Report, *supra* note 14, at 79–81 (detailing how municipal court and policing practices related to fine and fee collection erode community trust in law enforcement).

[73] *See* Second Amended Complaint, *Morrow v. City of Tenaha*, No. 2:08-cv-288-JRG (E.D. Tex. June 30, 2009), ECF No. 43.

defendants, even though Black people comprise approximately 27% of the state's population.[74]

III. UNCHECKED FINES, FEES, AND FORFEITURES UNDERMINE PUBLIC SAFETY BY CREATING INCENTIVES FOR ABUSE AND DIVERTING JUSTICE-SYSTEM RESOURCES TOWARD REVENUE COLLECTION.

Without sufficient legal checks at the state and local level, the rise in fines, fees, and forfeitures has established perverse financial incentives that prioritize collection and asset seizure over measures to promote public safety. This can lead to abuse by government and private actors and redirection of public resources toward revenue generation and away from combatting crime.

a. The Risk of Abuse is High Because Financial Incentives Push State and Local Officials to Maximize Revenue From Fines, Fees, and Forfeitures.

The reliance on fines, fees, and forfeitures for state and local revenue and justice-system funding has created powerful incentives for abuse. The Justice Department's 2015 report highlighted

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[74] Alabama Appleseed & Southern Poverty Law Center, *Forfeiting Your Rights: How Alabama's Profit-Driven Civil Asset Forfeiture Scheme Undercuts Due Process and Property Rights* 5, https://www.splcenter.org/sites/default/files/com_civil_asset_forfeiture_report_finalnocrops.pdf.

Ferguson, Missouri's dependence on fines and fees for municipal revenue, and the resulting misdirection of policing.[75] There, the city finance director explicitly urged both the police chief and the city manager to write more tickets in order to fill municipal coffers.[76] The Justice Department found that "[t]he City's emphasis on revenue generation has a profound effect on [the Ferguson Police Department's] approach to law enforcement," producing "aggressive enforcement of Ferguson's municipal code, with insufficient thought given to whether enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation."[77] The unchecked focus on revenue generation resulted in chronic violations of First, Fourth, and Fourteenth Amendment rights.[78]

Ferguson is not alone. The overreliance of state and local governments and justice-system stakeholders on fine and fee revenue creates powerful incentives to impose and collect excessive monetary penalties—regardless of an individual's ability to pay. For example, a federal court recently ruled that the New Orleans Parish Criminal District Court ("NOPCD") has "an institutional conflict of interest" in making determinations about defendants' ability to pay because fine and fee proceeds are funneled directly into a Judicial

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[75] U.S. Dep't of Justice Ferguson Report, *supra* note 14, at 9.

[76] *Id.* at 6.

[77] *Id.* at 2.

[78] *Id.* at 15–78.

Expense Fund controlled by judges.[79] The court also found that NOPCD had "a policy or practice" of not inquiring into criminal defendants' ability to pay before imprisonment for nonpayment of court debts.[80] Such financial conflicts of interest result in shocking abuse. In 2017, a Mississippi judge entered an order prohibiting a mother from having contact with her four-month-old baby until she paid her court fees in full, and was reported to have taken similar action with respect to other parents.[81]

Similar abuses occur when municipalities enlist for-profit companies to boost revenue by using pay-only probation to collect fines and fees. A 2014 report exposed the use of arrest and jail by these companies in Georgia, Alabama, and Mississippi when seeking to collect from impoverished probationers.[82] Because fees constitute these companies' sole source of revenue, employees face an inherent conflict of interest: helping courts identify indigent people whose fines and fees should be waived, reduced, or converted to alternatives directly

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[79] Order and Reasons, *Cain v. City of New Orleans*, No. 2:15-cv-04479-SSV-JCW(E.D. La. Aug. 2, 2018), ECF No. 318., No. 2:15-cv-04479-SSV-JCW(E.D. La. Aug. 2, 2018), ECF No. 318.

[80] *Id.* at 23.

[81] *MacArthur Justice Center Initiated Demands that Led to Mississippi Youth Court Judge Resigning*, The University of Mississippi School of Law (Oct. 26, 2017), https://law.olemiss.edu/macarthur-justice-center-initiated-demands-that-led-to-mississippi-youth-court-judge-resigning.

[82] Human Rights Watch, *supra* note 37, at 16.

hurts their employer's bottom line.[83] Numerous federal lawsuits have challenged resulting abuses.[84]

Forfeitures also create profound incentives for abuse.[85] "Forfeiture laws typically place few limits on law enforcement spending of forfeiture proceeds and impose even fewer checks to ensure that expenditures are proper or legal."[86] Local agencies that control seized assets have engaged in clear abuse. Several victims of the Tenaha, Texas forfeiture program were threatened with the removal of their children to foster care if they refused to part with their cash and valuables—and in at least one instance, one man's 16-month-old son was seized along with his money.[87] A small vice squad based in Bal Harbor, Florida—a town of 3,300 residents—generated nearly $50 million through civil forfeitures

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[83] *See id.* at 2–3, 42–45.

[84] *See, e.g., Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 770–771 (M.D. Tenn. Dec. 17, 2015) (finding that a for-profit collection company's failure to inquire into ability to pay before stacking fees and effectively revoking probation raised due process and equal protection concerns); *Ray v. Judicial Corr. Servs.*, No. 2:12-CV-02819-RDP, 2013 WL 5428395, at *3–4, (N.D. Ala. Sept. 26, 2013) (describing claims against for-profit company for post-judgment probationary program leading to incarceration without pre-deprivation ability-to-pay hearing); Complaint, *Kennedy v. Biloxi*, No. 1:15-cv-348-HSO-JCG, at *2–3, 5–6 (S.D. Miss. Oct. 21, 2015), ECF No.1 (bringing constitutional claims against for-profit probation company for unlawful fine and fee collection practices).

[85] Carpenter, *supra* note 5.

[86] *Id.* at 7.

[87] *See* Second Amended Complaint, *Morrow v. City of Tenaha*, *supra* note 73.

in three years, and then used the money for luxury car rentals, first-class plane tickets, a $100,000 police boat, and a $20,000 drug-prevention beach party.[88] Out of the nearly $3.4 million spent by the Oklahoma Highway Patrol under the Equitable Sharing Program during a three-year period, $1.9 million constituted unallowable and unsupported expenditures relating to salaries, overtime pay, construction, contractor fees, and the use of two pickup trucks by non-law enforcement personnel.[89]

The financial incentives driving fines, fees, and forfeitures also divert resources away from legitimate public safety measures.[90] A 2016 study found that every one percent increase in the share of a jurisdiction's revenue from fines, fees, and forfeitures "is associated with a statistically and substantively significant 3.7 percentage point decrease in the violent crime clearance rate."[91] In Ferguson, Missouri, the pressure to raise revenue

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[88] Stillman, *Taken*, *supra* note 67.

[89] Robert O'Harrow et al., *Asset Seizures Fuel Police Spending*, Wash. Post (Oct. 11, 2014), https://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/?noredirect=on&utm_term=.d985456fadcc.

[90] *Shackled to Debt*, *supra* note 2, at 6–7; *see also* 2011–2012 Conference of State Court Administrators, *2011-2012 Policy Paper: Courts are Not Revenue Centers* (2012), https://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx.

[91] Rebecca Goldstein et al., *Exploitative Revenues, Law Enforcement, and the Quality of Government Service* 4 (2017), http://www.law.nyu.edu/sites/default/files/upload_documents/YOU_policing.pdf.

through unnecessary traffic tickets and arrests siphoned resources from responding to complaints and charges of officer misconduct and from implementing community policing strategies.[92] In 2013, the American Association of Motor Vehicle Administrators concluded that driver's license suspensions for people unable to pay traffic fines and fees undermine safety because "the costs of arresting, processing, administering, and enforcing social non-conformance related driver license suspensions create a significant strain on budgets and other resources and detract from highway and public safety priorities."[93]

Probation and parole officers in several states have explicitly acknowledged that their role as debt collectors is at odds with their main purpose: to ensure that people on supervised release do not commit new offenses. [94] A 2010 study of collection practices of fifteen state courts found that all of the states required courts and probation and parole officers to be involved in fine and fee collection.[95] Virginia abolished its parole supervision fee in part due to parole officers' objection to their role in

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[92] U.S. Dep't of Justice Ferguson Report, *supra* note 14, at 79.

[93] American Association of Motor Vehicle Administrators, *Best Practices Guide to Reducing Suspended Drivers* 4 (2013), https://www.aamva.org/Suspended-and-Revoked-Drivers-Working-Group/.

[94] Bannon et al., *supra* note 20, at 31.

[95] *Id.* at 30 n.118 (citing the statutory codes for 15 states).

collections.[96] As one official stated, "parole officers are not loan sharks."[97] Expansive civil forfeiture practices similarly divert prosecutorial and police resources toward seizures of property and cash and litigating *in rem* civil forfeiture proceedings—and away from crucial public safety functions, including investigative police fieldwork, litigating criminal cases, and testifying in criminal proceedings.[98] Excessive fines, fees, and forfeitures thus lead to abuse at the expense of public safety.

b. Unchecked Fines, Fees, and Forfeitures Promote Recidivism.

A consensus has emerged in recent decades that assisting people who have contact with the criminal justice system with reintegration into their families and communities reduces recidivism and promotes public safety.[99] In 2008, Congress enacted the Second Chances Act with bipartisan support to reduce recidivism and improve outcomes for people

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[96] *Id.* at 31 (citing an interview with Walter Pulliam, Chief of Operations, Virginia Dep't of Corrections, Divisions of Community Corrections (Jan.8, 2009)).

[97] *Id.*

[98] Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 Harv. L. Rev. 2387 (June 8, 2018), https://harvardlawreview.org/wp-content/uploads/2018/06/2387-2408_Online.pdf.

[99] The Council of State Governments & The National Reentry Resource Center, *Making People's Transition from Prison and Jail to the Community Safe and Successful: A Snapshot of National Progress in Reentry* 2 (2017), https://csgjusticecenter.org/wp-content/uploads/2017/06/6.12.17_A-Snapshot-of-National-Progress-in-Reentry.pdf.

leaving prisons, jails, and juvenile facilities.[100] More than $540 million in federal funds have been spent toward these programs,[101] and nearly half of U.S. governors cited re-entry as a priority for their states in 2016 and 2017.[102] These investments support employment training, education, mentoring, services to strengthen family relationships, and housing programs.[103]

Unchecked fines, fees, and forfeitures directly impede these efforts. People in contact with the criminal justice system are disproportionately indigent and likely to owe significant fines and fees.[104] At the same time, they face considerable barriers to finding and keeping a job.[105] They confront the difficult choice of using scarce resources to pay fines and fees as opposed to paying for food, medicine, rent, and child support; even a $50 monthly payment can divert a significant share of

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[100] *Id.*

[101] *Id.*

[102] *Id.* at 4 (describing governors' identification of re-entry programs as a priority in their State of the State addresses).

[103] *See* Bureau of Justice Assistance, U.S. Dep't of Justice, *Second Chance Act Fact Sheet* (Jan. 2016), https://csgjusticecenter.org/wp-content/uploads/2014/08/SCA_Fact_Sheet.pdf; The Council of State Governments, *Reentry Matters: Strategies and Successes of Second Chance Act Grantees Across the United States* (Nov. 2013), https://csgjusticecenter.org/wp-content/uploads/2013/11/ReentryMatters.pdf.

[104] *See* Bureau of Justice Assistance, *Contracting for Indigent Defense Services*, *supra* note 33.

[105] *Shackled to Debt*, *supra* note 2, at 9.

monthly income.[106] And as detailed above, when people seeking to disentangle themselves from the criminal justice system cannot pay, a parade of consequences undermining economic security may follow—including driver's license suspension, liens, wage garnishment, tax rebate interception, loss of federal benefits, damaged credit, and even incarceration.[107] Forfeiture can also strip people of money needed for rent, medicine, child care or other expenses, or cars required to get to school or work.[108] Excessive fines, fees and forfeitures thus subvert the ability of people to sustain their livelihoods while attempting to leave the criminal justice system, undermining efforts to combat recidivism.[109]

IV. THE EXCESSIVE FINES CLAUSE PROVIDES A CRUCIAL AND NECESSARY CHECK AGAINST ABUSIVE FINES, FEES, AND FORFEITURES IMPOSED BY STATE AND LOCAL GOVERNMENT.

The Excessive Fines Clause is a constitutional provision expressly intended to address abuses such

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[106] Beckett & Harris, *supra* note 33, at 517.

[107] *See supra* discussion Section II.

[108] *See* Stillman, *Taken*, *supra* note 67.

[109] *See* Lawyer's Committee for Civil Rights, *supra* note 65, at 20 (finding that "[b]y impeding efforts at employment, license suspensions decrease access to legitimate work opportunities and pose a threat to successful reentry for people who are attempting to reintegrate into their communities"); Bannon et al., *supra* note 20.

as those discussed above. While not every practice described would necessarily violate the clause, it was designed to shield people from the potentially devastating monetary sanctions and forfeitures the government could otherwise impose. *See United States v. Bajakajian*, 524 U.S. 321, 328 (1998) ("The Excessive Fines Clause . . . limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.") (internal quotation marks and citation omitted). In particular, it was designed to forestall sanctions that would be disproportionate to the gravity of an offense or would deprive individuals of their livelihood. If incorporated and applied to the States, the clause will fulfill its original purpose of ensuring that punishments are not overly harsh, and that individuals are not deprived of "liberty . . . or property, without due process of law." U.S. Const. amend. XIV, § 1.

a. The Excessive Fines Clause is a Fundamental Right Incorporated in the Due Process Clause of the Fourteenth Amendment.

The right to be free from excessive monetary penalties is "fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), and lies squarely at the heart of the liberty and property interests protected by the Fourteenth Amendment. *See also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 764 (2010). The deep historical roots of the right are well-established; the Court has already recognized that the Excessive Fines Clause traces back to the Magna Carta. *See Bajakajian*, 524 U.S. at 335; *Browning-Ferris Indus. of Vermont, Inc.*

v. Kelco Disposal, Inc., 492 U.S. 257 (1989). At the time of the U.S. Constitution's ratification, most States had analogues to the Excessive Fines Clause delineated in State Constitutions or Declarations of Rights.[110]

Moreover, incorporation furthers the purposes of both the Eighth and Fourteenth Amendments in three ways.

First, the Court has treated as fundamental those rights that protect individuals in the criminal justice system. "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *see also Mapp v. Ohio*, 367 U.S. 643, 656 (1961) ("This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government . . . the rights to notice and to a fair, public trial[.]"); *Duncan*, 391 U.S. at 155 ("The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered.").

The right to be free from excessive fines directly mirrors other criminal justice protections that this Court has already deemed fundamental, including the two other clauses of the Eighth Amendment, *Schilb v. Kuebel*, 404 U.S. 357 (1971);

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[110] Amici concur with the detailed historical analysis submitted to the Court by Petitioners. *See, e.g.*, Pet'r's Br. 15–16.

Robinson v. California, 370 U.S. 660, 82 (1962). It would make little sense to sever the Excessive Fines Clause from the previously incorporated provisions of the Eighth Amendment. *Cf. Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (observing that the Eighth Amendment placed "parallel limitations" on "[b]ail, fines, and punishment").

As this brief documents, there is a clear need for constitutional protections in this area. State and local fines, fees, and forfeitures can become tantamount to life sentences for poor and low-income people who struggle for years to discharge debt accumulated for even minor offenses. These sanctions affect many aspects of an individual's life, including economic security, ability to drive, to vote—even physical liberty. Fines, fees, and forfeitures thus have a particularly severe impact on the poor. The Court "has long been sensitive to the treatment of indigents in our criminal justice system," *Bearden*, 461 U.S. at 664, and has carved out protections to "mitigate the disparate treatment of indigents in the criminal process." *Williams v. Illinois*, 399 U.S. 235, 241 (1970). The rights protected by the Excessive Fines Clause overlap with other constitutional rights of indigent defendants that are already enforceable against the States, such as the prohibition against jailing people who cannot pay fines and fees. *See Bearden*, 461 U.S. at 664.

Second, the Excessive Fines Clause is fundamental to the American system of justice because it provides a bulwark against abusive sanctions driven by government self-interest. The Court has expressly recognized this risk of abuse when incorporating the prohibition against taking

private property without just compensation. *See Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897) ("[A]lmost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.") (citation omitted). "[T]he primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power[.]" *Browning-Ferris*, 492 U.S. at 266. And the specific purpose of the Eighth Amendment's Excessive Fines and Cruel and Unusual Punishment Clauses "was to limit the government's power to punish." *Austin v. United States*, 509 U.S. 602, 609 (1993). If incorporated, the Excessive Fines Clause can help check the powerful financial incentives for state and local officials to abuse people entangled in the justice system.

The importance of constitutional protection against excessive punishment is magnified for monetary sanctions in particular because "the State stands to benefit" from their imposition:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. . . . [I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.

Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991). This is why, of the many types of punishment

available to the government, the Framers singled out monetary sanctions for particular scrutiny and regulation.

The temptation to generate revenue through fines, fees, and forfeitures is actively fueling abusive practices across the country. *See supra* § III.A. For example, Ferguson's unchecked focus on collections contributed to the rampant use of warrants to coerce payments and additional financial penalties for, and incarceration of, people who could not afford to pay.[111]

Third, a central responsibility of the judiciary within our constitutional system is to evaluate the propriety of sentences in proportion to the characteristics of the offense and the circumstances of the offender. There should be no debate that the imposition of fines, fees, and forfeitures "involve[s] matters as to which judges possess a comparative expertise, by virtue of their close familiarity with the justice system and its operation." *McDonald*, 561 U.S. at 921 (Stevens, J., dissenting). While the legislature typically retains authority to set fines and fees and delineate the elements of offenses, judges are entrusted with evaluating a sentence in relation to a particular individual. Incorporation of the Excessive Fines Clause would therefore complement the comparative advantages and expertise of the judiciary with respect to the propriety of fines in particular circumstances.

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[111] *See* U.S. Dep't of Justice Ferguson Report, *supra* note 14, at 4, 42, 53–57.

b. The Excessive Fines Clause Properly Considers an Individual's Financial Circumstances in Assessing Whether a Fine is Excessive.

As discussed *supra*, the burden of increased government reliance on fines, fees, and forfeitures to generate revenue has fallen predominantly on low-income people—those already disproportionately entangled in the criminal justice system and least able to shoulder the costs. The Excessive Fines Clause can help check these abuses because, properly interpreted, it considers the impact of monetary sanctions and forfeitures on the individual. A fine, fee, or forfeiture that is not excessive as to a wealthy individual may be excessive as to a poor or low-income individual, just as incarceration for failure to pay a fine may be permissible for the wealthy, but not for those who cannot afford to pay.

The Excessive Fines Clause properly considers an individual's financial circumstances in determining whether a fine, fee, or forfeiture is excessive. The Court holds that "[t]he touchstone of the constitutional inquiry under the Excessive Fines clause is the principle of proportionality[.]" *Bajakajian*, 524 U.S. at 334. *Bajakajian* examined the predecessors to the Clause in the English Bill of Rights and the Magna Carta, which required that fines "be proportioned to the offense and that *they should not deprive a wrongdoer of his livelihood.*" 524 U.S. at 335 (emphasis added). In *Bajakajian*, the Court left open the question of whether inquiring into an individual's financial circumstances is required because the defendant had "not argue[d]

that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood . . . and the District Court made no factual findings in this respect." 524 U.S. at 340 n.15.

Lower federal courts have concluded that judges must consider an individual's financial circumstances when evaluating an Excessive Fines claim. The First Circuit, for example, recognized that "the notion that a forfeiture should not be so great as to deprive a wrongdoer of his or her livelihood is deeply rooted in the history of the Eighth Amendment," and held that a district court erred in failing to consider whether a forfeiture would "deprive a defendant of his livelihood." *United States v. Levesque*, 546 F.3d 78, 83–84 (1st Cir. 2008); *see also United States v. Fogg*, 666 F.3d 13 (1st Cir. 2009) (proper question under Excessive Fines analysis is whether fine threatens to deprive defendant of future livelihood).

The Second Circuit has adopted a similar approach, holding that "courts may consider . . . whether [a] forfeiture would deprive the defendant of his livelihood, *i.e.*, his future ability to earn a living." *United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016) (internal quotation marks and citation omitted), *cert. denied*, 137 S. Ct. 1223 (2017). The Ninth Circuit has also held that in assessing the proportionality of a forfeiture, a court should consider "the hardship to the defendant, including the effect of the forfeiture on a defendant's family or financial condition." *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 985 (9th Cir. 1995), *superseded in part by Bajakajian*, 524 U.S. at 336;

see also United States v. King, 231 F. Supp. 3d 872, 904–05 (W.D. Okla. 2017) (recognizing that Excessive Fines Clause analysis requires consideration of whether a forfeiture "is grossly disproportionate to the defendant's offense" and would ruin "the defendant's future ability to provide a livelihood").[112]

These cases recognize the principle that fines, fees, and forfeitures cannot pass constitutional muster when they deprive individuals of their ability to maintain a livelihood—a principle amply supported by antecedents to the Excessive Fines Clause.[113] That is too often precisely the effect of fines, fees, and forfeitures on poor and low-income

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[112] Other courts have applied different analyses depending on whether the penalty is a fine, forfeiture, or restitution. *Compare, e.g., United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998) ("[I]n the case of fines, as opposed to forfeitures, the defendant's ability to pay is a factor under the Excessive Fines Clause") *with United States v. Smith*, 656 F.3d 821, 828 (8th Cir. 2011) (deeming "defendant's inability to satisfy a forfeiture at the time of conviction" not relevant to constitutional analysis). The Eleventh Circuit has rejected consideration of an individual's financial circumstances under the Excessive Fines Clause. *See United States v. Seher*, 562 F.3d 1344, 1371 (11th Cir. 2009).

[113] The brief submitted by legal scholars of the Eighth Amendment provides compelling historical data in support of this principle. *See* Brief of Amici Curiae Eighth Amendment Scholars at 2–3, 23, 27–30 (discussing "substantial evidence" from the Magna Carta, common law, English Bill of Rights, and early State constitutions that protection from excessive fines guards against penalties that "exceed an offender's ability to pay" and would deprive the individual of "a minimum core level of economic subsistence").

people. As detailed *supra*, Mr. Fisher of Colorado struggled for nearly four years to pay approximately $1500 arising from two minor open container tickets and a traffic citation, but still owed more than $800. He made these efforts despite the fact that he was homeless and could secure only intermittent work as a day laborer. Although some people could pay $678 in fines without hesitation, the enduring financial burden on Mr. Fisher from these fines and accumulating collection fees was both economically catastrophic and fundamentally unjust in light of his circumstances.

CONCLUSION

In light of the abuses detailed above, the Court should hold that the Excessive Fines Clause is incorporated via the Fourteenth Amendment and applies to the States.

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APPENDIX

STATES WITH DOCUMENTED INCARCERATION OF INDIVIDUALS FOR UNPAID COURT FINES AND FEES

Since 2010, cases in which individuals were incarcerated for unpaid court fines and fees without pre-deprivation ability-to-pay hearings have been documented in the following fifteen states:

Alabama:

> *Ray v. Judicial Corr. Servs.*, No. 2:12-cv-02819-RDP, 2013 WL 5428395, at *3–5 (N.D. Ala. Sept. 26, 2013); *Cleveland v. City of Montgomery*, Nos. 2:13-cv-732–MHT, 2:13-cv-733–MHT, 2014 WL 6461900, at *6–7 (M.D. Al. Nov. 17, 2014) (order enforcing settlement agreement to resolve plaintiff's allegations of unlawful incarceration for inability to pay fines and fees to municipal court and probation company).

Arkansas:

> Order, *Dade v. City of Sherwood, Arkansas*, No. 4:16-cv-602-JM-JJV (E.D. Ark. Nov. 11, 2017) (retaining jurisdiction to enforce settlement agreement resolving plaintiffs' allegations of unlawful incarceration for inability to pay fines and fees to municipal court).

Colorado:

> *Debtors' Prisons*, ACLU of Colorado, http://aclu-co.org/court-cases/debtors-prisons

(compiling 2013 letters to municipalities concerning illegal jailing of people unable to pay fines and fees); Christopher N. Osher, *Colorado lawmakers pass bill to close "debtors' prison" loophole*, The Denver Post, https://www.denverpost.com/2016/05/02/colorado-lawmakers-pass-bill-to-close-debtors-prison-loophole/.

Georgia:

Complaint, *Thompson v. Dekalb County*, No. 1:15-cv-280-TWT (N.D. Ga. Jan. 29, 2015), https://www.aclu.org/sites/default/files/field_document/2015.01.29_filed_thompson_complaint.pdf.

Louisiana:

Cain v. New Orleans, No. 2:15-cv-04479-SSV-JCW at 1 (E.D. La. Aug. 3, 2018) (holding that judges of the Orleans Parish Criminal District Court "have a policy or practice of not inquiring into criminal defendants' ability to pay before those individuals are imprisoned for nonpayment of court debts"); ACLU of Louisiana, *Louisiana Debtors' Prisons: An Appeal To Justice* (2015), https://www.laaclu.org/sites/default/files/field_documents/2015_Report_Louisiana_Debtors_Prisons_0.pdf.

Maine:

Scott Dolan, *Taxpayers lose as Maine counties jail indigents over unpaid fines*, Portland Press Herald (May 31, 2015), https://www.pressherald.com/2015/05/31/taxpayers-lose-as-maine-counties-jail-indigents-

over-unpaid-fines/; The BDN Editorial Board, *Keeping poor in jail isn't justice, worsens overcrowding*, Bangor Daily News (Jan. 26, 2016), http://bangordailynews.com/2016/01/26/opinion/editorials/keeping-poor-in-jail-isnt-justice-worsens-overcrowding/.

Michigan:

Complaint for Superintending Control, *In re Donna Elaine Anderson*, Circuit Court Case No. 15-2380-AS (Cir. Court County of Macomb Jul. 9, 2015), http://www.aclumich.org/sites/default/files/Motion%20for%20Class%20Cert%20as%20filed.pdf.

Mississippi:

Class Action Complaint, *Kennedy v. City of Biloxi*, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. Oct. 21, 2015), https://www.aclu.org/kennedy-v-city-biloxi-complaint; Class Action Complaint, *Bell v. City of Jackson*, No. 3:15-cv-732-TSL-RHW (S.D. Miss. Oct. 9, 2015), https://www.macarthurjustice.org/wp-content/uploads/2018/07/Bell-v.-City-of-Jackson.pdf.

Missouri:

Class Action Complaint, *Fant v. Ferguson*, No. 4:15-cv-00253 (E.D. Mo. Feb. 8, 2015), http://www.archcitydefenders.org/wp-content/uploads/2015/06/Complaint-Ferguson-Debtors-Prison.pdf.

New Hampshire:

ACLU of New Hampshire, *Debtors' Prisons In New Hampshire* (2015), http://aclu-nh.org/wp-content/uploads/2015/09/Final-ACLU-Debtors-Prisons-Report-9.23.15.pdf.

Ohio:

ACLU of Ohio, *The Outskirts of Hope: How Ohio's Debtors' Prisons are Ruining Lives and Costing Communities* (2013), http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf.

South Carolina:

Brown v. Lexington County, South Carolina, No. 3:17-cv-1426-MBS, 2018 WL 1556189, *2–5 (D.S.C. Mar. 29, 2018).

Tennessee:

Class Action Complaint, *Rodriguez v. Providence Community Corr. Inc.*, No. 3:15-cv-01048 (M.D. Tenn. Oct. 1, 2015), https://equaljusticeunderlaw.org/s/complaint_file_stamped.pdf.

Texas:

Class Action Complaint, *West v. City of Sante Fe*, No. 3:16-cv-00309 (S.D. Tex. Nov. 3, 2016), https://www.aclutx.org/sites/default/files/santa_fe_complaint_final_11-3-2016.pdf; ACLU of Texas, *No Exit-Texas, Modern-Day Debtors' Prisons and the Poverty Trap* (2016), https://www.aclutx.org/sites/default/files/no_exit_texas_-_modern-

day_debtors_prisons_and_the_poverty_trap_11-2016.pdf (describing unlawful jailing of people unable to pay).

Washington:

Complaint for Declaratory and Injunctive Relief, *Fuentes v. Benton County, Washington*, No. 15-2-02976-1 (Sup. Ct. Wash. Yakima County Oct. 6, 2015), https://www.aclu.org/sites/default/files/field_document/fuentes_v._benton_county_-_complaint.pdf; ACLU of Washington and Columbia Legal Services, *Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People For Being Poor* (2014), https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf.

No. 17-1091

In the Supreme Court of the United States

TYSON TIMBS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR THE AMERICAN CIVIL RIGHTS UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan 501(c)(3) nonprofit public-policy organization dedicated to protecting constitutional liberty. Incorporated in Washington, D.C., the ACRU is dedicated to promoting originalism: that in the United States' democratic republic, the only legitimate way for politically unaccountable federal judges to interpret the law is in accordance with the original public meaning of its terms. The ACRU Policy Board includes former Attorney General Edwin Meese III, as well former Assistant Attorneys General Charles J. Cooper and William Bradford Reynolds.

Here, the ACRU seeks to advance an originalist interpretation of the Fourteenth Amendment in two ways. First, provisions of the Bill of Rights that apply to the States do so through the Privileges or Immunities Clause. And second, continuing to incorporate federal rights into the Due Process Clause via substantive due process propagates a doctrine that has shown itself to be a wellspring of errant precedents that facilitate judicial intrusion into the purview of the elected branches of the federal government and the States.

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[1] *Amicus Curiae* American Civil Rights Union certifies that all parties have consented to the filing of this brief, and were timely notified. No party or counsel for any party authored this brief in whole or in part, and no person or entity other than the American Civil Rights Union contributed any money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The American Civil Rights Union (ACRU) agrees that the Eighth Amendment's Excessive Fines Clause applies to the States, and offers supplemental arguments supporting that conclusion.

The Indiana Supreme Court should have weighed in on this. That court—like all courts—is bound by the Supreme Court's constitutional holdings. The Supreme Court has handed down numerous decisions relevant to the question in this case, and the Indiana court was obliged to follow those cases and render a decision.

Under this Court's decision in *Marks*, the current rule for decision is Justice Thomas's concurring opinion in *McDonald v. Chicago*, 561 U.S. 742 (2010). That decision is more narrow than the substantive due-process plurality opinion, as the former concerns the Privileges or Immunities Clause, which applies only to citizens, while the latter concerns the Due Process Clause, and therefore applies both to citizens and to noncitizens.

The Court could incorporate the Excessive Fines Clause without overruling the *Slaughter-House Cases*. Properly read, that 1873 case leaves open the possibility of including provisions from the Bill of Rights. The Court's 1876 *Cruikshank* decision, however, is squarely on point, and its reasoning has been repudiated by numerous subsequent cases, and it should accordingly be overruled.

Should this Court be unable to agree on a majority rationale, the law and the Nation would be better served by a fractured Court than to reaffirm substantive due process, as that doctrine has been the

source of needless controversy and confusion in the law.

ARGUMENT

Amicus American Civil Rights Union (ACRU) agrees that the Eighth Amendment's Excessive Fines Clause applies to the States. The ACRU also agrees with many—though not necessarily all—of the reasons Petitioner Timbs and various *amici* argue in support of incorporating the Clause to the States through the Fourteenth Amendment.[2] Rather than unnecessarily burden this Court by repeating arguments given by others with which the ACRU agrees or pointing out differences where it does not, the ACRU instead presents several supplemental and alternative points to inform the Court's analysis here.

I. THE INDIANA COURT WAS REQUIRED TO RULE ON THE FOURTEENTH AMENDMENT QUESTION.

The Supreme Court of Indiana had no choice but to definitely rule on the question of whether the Excessive Fines Clause applies to the States through the Fourteenth Amendment. The state court evidently felt free not to perform an incorporation analysis. The

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[2] As discussed elsewhere in this brief, the term incorporation technically refers to whether a substantive right is incorporated as a substantive element into the Fourteenth Amendment Due Process Clause. This brief clearly argues in favor of applying the Excessive Fines Clause to the States through the Privileges or Immunities Clause, but uses variations of the term "incorporate" as a shorthand term of art to applying provisions of the Bill of Rights to the States through any relevant provision of the Fourteenth Amendment.

court was mistaken, and did not fulfill its obligation as a lower court.

State courts generally have concurrent jurisdiction to decide federal issues. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Unless Congress confines jurisdiction to the federal courts either explicitly or implicitly on a specific matter, state courts have full authority to interpret federal law. *Id.* at 459. There is no such impediment here. The Indiana judiciary had jurisdiction to decide the Eighth Amendment question presented by this case.

Even if the Indiana Supreme Court had the option of taking a pass on the question of incorporation, doing so turns the system of developing federal constitutional law on its head. This Court places "trust in lower judicial authority" as a safeguard against the "improvident exercise of [this Court's] discretionary jurisdiction." *California v. Carney*, 471 U.S. 386, 396–97 (1985) (Stevens, J., dissenting). As a matter of prudence, this Court vastly prefers a "fully percolated conflict" in the lower courts before taking up a question to resolve. *See id.* at 398 (internal quotation marks omitted). "Premature resolution of [a] novel question . . . stunt[s] the natural growth and refinement of alternative principles." *Id.* at 399. This Court as a general matter does not decide issues unless they have been developed by the lower courts and properly presented to this Court. *See Wisconsin v. Mitchell*, 508 U.S. 476, 481 n.2 (1993). Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," which is why abstention doctrines are invoked circumspectly. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817

(1976). While state courts are not bound by all the principles that constrain the federal judiciary, the role of state courts in resolving federal constitutional questions is the same as the inferior federal courts, in either developing a consensus that may make the intervention of this Court unnecessary, or creating a court split that eventually calls for this Court to articulate a clear rule for the Nation. The Indiana Supreme Court abdicated that role and responsibility by deciding that it would not rule on a question properly before it, a matter possibly subject to later review by this Court, tasking this Court with acting first.

While judicial humility is refreshing when appropriate. But the Indiana Supreme Court had no option here; it was obligated to render a decision.

II. *Marks* Required the Supreme Court of Indiana to Incorporate through the Privileges or Immunities Clause.

The Constitution establishes a system of dual co-sovereigns, wherein both the government of the United States and the governments of the several States are both sovereign in their respective spheres of authority. *Alden v. Maine*, 527 U.S. 706, 713–14 (1999). State courts—including state supreme courts—are not bound to obey the inferior courts in the federal system. However, state courts must obey this Court on federal constitutional questions when this Court properly has jurisdiction over a matter. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 516–17 (2012) (per curiam) (summarily reversing Montana Supreme Court's disregarding *Citizens United v. FEC*, 558 U.S. 310 (2010), in a campaign-finance case). This Court

does not give "guidance," which state supreme courts can elect to follow or not. It is instead the province of this Court to declare "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

A. The Indiana Court should have performed a *Marks* analysis.

When this Court issues a fractured decision, lower courts must apply the analysis proscribed by *Marks v. United States*, 430 U.S. 188 (1977). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgements on the narrowest grounds." *Id.* at 193 (internal quotation marks omitted).

The rule from *Marks* is notably underdeveloped. For example, often lower courts struggle to identify the "narrowest" opinion to cite as controlling. *See, e.g.*, *Hughes v. United States*, 138 S. Ct. 1765, 1771 (2018) (applying *Marks* to Supreme Court precedent on Federal Sentencing Guidelines). This can lead to confusion as to what to do when there are multiple opinions in a deeply fractured Court that provide multiple "narrow" opinions that can be combined with others to total a majority. Even Justices of this Court can disagree on which opinion is controlling. *See, e.g.*, *City of Ontario v. Quon*, 560 U.S. 746, 767 (2010) (Scalia, J., concurring in part and concurring in the judgment) ("There is room for reasonable debate as to which of the two approaches advocated by Justices whose votes supported the judgment in [a previous case]—the plurality's and mine—is controlling under [*Marks*].").

As another example, the Court has never explicitly determined for a rule binding upon lower courts under *Marks* how much precedential weight this Court should subsequently accord that case for purposes of stare decisis. The Court's consideration of Justice Powell's concurring opinion from *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), or the Court's recent consideration in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), of both Justice Blackmun's plurality opinion and Justice Scalia's concurring opinion in *Burson v. Freeman*, 504 U.S. 191 (1992), are examples of where such development would be helpful. While the Court's apparent methodology seems to suggest that the Court is free to work its will in subsequent cases when the rule of decision for the lower courts rested upon *Marks* rather than a majority opinion, lower courts—most notably here, the Indiana Supreme Court—would benefit from this Court's expounding further upon when and how to follow *Marks*.

Considering the intersection of *Marks* and stare decisis is hardly an academic conversation; it is central to this case. Lower courts need clear instruction as to which opinion from *McDonald v. City of Chi.*, 561 U.S. 742 (2010), is controlling, and here this Court must determine how much weight to give Justice Alito's plurality opinion and Justice Thomas's concurring opinion from that same case.

For purposes of inferior courts, the controlling opinion should be the one that supplied the necessary fifth vote to create a majority (when the Court is comprised of nine Members). Assume that there is a

three-Justice plurality opinion asserting a broad rule with elements A, B, C, and D. Justice 4 concurs in part, believing the rule should include elements A, B, and C. Justice 5 concurs more narrowly, advocating only elements A and B. Justice 6 concurs more narrowly still, embracing only element A, and specifically rejecting B, C, and D. Justice 7 concurs in the judgment only, rejecting elements A, B, C, and D, and instead insists that element E should control, with element E being clearly narrower in scope that any of the elements (A, B, C, and D) embraced in the other opinions. The remaining two Justices dissent. Under this hypothetical, the controlling opinion should be that of Justice 5, meaning that the rule for lower courts consists of elements A and B. Two Justices had narrower opinions and their votes formed part of the judgment of the Court, but the narrowness of their opinions should not constrain lower courts, because a rationale of elements A and B garnered the support of the majority of the Court. Their votes were superfluous, and should not constrain what can in some respects be considered essentially a 5-4 decision of the Court. In a sense, after the votes for the broadest opinion is tallied, and the Court continues to add votes in order of breadth, the controlling opinion should be the "broadest" narrow opinion that crosses the threshold to create a majority rationale.

For purposes of this Court when deciding subsequent cases, each of the opinions of the fractured Court should be persuasive authority only—to the extent that any of them persuade—with no precedential weight given to any. Specifically, the Court should be wary of assertions of reliance interests, which are often part of a stare decisis analysis. *See,*

e.g., *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2484 (2018) (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)). Take for example Justice Breyer's concurrence in *Van Orden v. Perry*, 545 U.S. 677 (2005). Justice Breyer declined to join any part of Chief Justice Rehnquist's plurality opinion for four Justices, instead positing that in "borderline cases" invoking the Establishment Clause, courts should reject any formulaic test or objective standard, relying instead upon the judge's sound "legal judgment." *Id.* at 700 (Breyer, J., concurring in the judgment). In many circuits (though not all),[3] this "legal judgment" approach is relied upon by state actors displaying the Ten Commandments and sometimes other religious displays as well. Those state actors have no choice but to rely upon what a single Justice wrote, but that "reliance" should not be mistaken as a justification for deferring to that single-Justice approach. As the Court considers how to clarify *Marks*, it should also clarify the weight given to previous decisions following *Marks*.

B. Under *Marks*, Justice Thomas's concurring opinion in *McDonald* controls here.

The Bill of Rights "originally applied only to the Federal Government." *McDonald*, 561 U.S. at 754 (discussing *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833), and *Lessee*

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[3] There is actually a circuit split regarding the rule of decision that courts should follow for displays containing religious content, as discussed in a case currently petitioning for the Court's review. *See* Petition for a Writ of Certiorari at i, *American Legion v. American Humanist Ass'n* (No. 17-1717).

of Livingston v. Moore, 32 U.S. (7 Pet.) 469, 551–52 (1833)). "The constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system." *Id.* The Privileges or Immunities Clause of the Fourteenth Amendment provides States may not abridge "the privileges or immunities of citizens of the United States," U.S. CONST. amend. XIV, § 1, cl. 2, while the Due Process Clause of the same Amendment provides that no State may deprive "any person of life, liberty, or property, without due process of law," *id.* § 1, cl. 3.

The part of *McDonald* joined by five Justices is a majority opinion that is of course controlling as a precedent of the Court. Other parts of the opinion are a four-Justice plurality authored by Justice Alito, incorporating the Second Amendment's right to bear arms into the Fourteenth Amendment's Due Process Clause via substantive due process. *McDonald*, 561 U.S. at 791. Justice Thomas wrote separately that the right to bear arms applies to the States through the Privileges or Immunities Clause. *Id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).

Justice Thomas's opinion is the more narrow one, and therefore controlling under *Marks*. Recent Census Bureau estimates are that there are 326 million persons currently residing in the United States. U.S. Census Bureau, Quick Facts, July 1, 2017, https://www.census.gov/quickfacts/fact/table/US/PST045217 (last visited Sept. 11, 2018). Although the most recent census did not ask whether each person is a citizen, an informal survey of the recent estimates show a consensus that there are perhaps approximately 40 million aliens (both those here legally

and those who are not) currently in the Nation. *See, e.g.*, Simran Khosla, *GlobalPost*, Jan. 17, 2015, *reproduced by Business Insider*, *available at* https://www.businessinsider.com/map-of-how-many-foreigners-in-each-us-state-2015-1 (last visited Sept. 11, 2018) (citing sources estimating 41.6 million noncitizens inside the United States).

Taking those numbers as rough estimates, that would mean that Justice Alito's opinion recognizes a right that can be claimed by 326 million persons, while Justice Thomas's opinion recognizes a right that can be claimed by approximately 286 million persons. Not only that, but—as explained later in this brief—Justice Alito's opinion brings to bear a doctrine that is sweeping in its breadth in comparison to a doctrine that—at least at the moment—seems much narrower in its application.

While courts may be much more familiar with substantive due process than with the privileges or immunities of U.S. citizens, nowhere does *Marks* say that familiarity with a doctrine or the likelihood that it will appear on a bar exam is a factor in determining which opinion to follow when looking to a fractured Supreme Court decision. Justice Thomas's opinion is the narrowest that supplies the fifth vote in *McDonald*, and therefore should have been followed by the Indiana Supreme Court.

III. THE COURT CAN INCORPORATE THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE WITHOUT OVERRULING *SLAUGHTER-HOUSE*.

It is not necessary for this Court to overrule the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), to incorporate the Excessive Fines Clause to the States. *Slaughter-House* was a case involving butchers claiming an unenumerated constitutional right of an economic nature that would supersede a local law in Louisiana restricting the slaughtering of animals within urban areas. *Id.* at 60. It could be construed a case governing unenumerated rights (i.e., implied rights), rather than comprehensively addressing the incorporation of provisions from the Bill of Rights.

Slaughter-House held that the Privileges or Immunities Clause protects only rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 79. For instance, *Slaughter-House* opined in dictum that the Privileges or Immunities Clause protected the right "to come to the seat of government to assert any claim [a U.S. citizen] may have upon that government." *Id.* at 79. However, that passage references an enumerated right from the Bill of Rights: the First Amendment right to "petition the Government for a redress of grievances." U.S. CONST. amend. I, cl. 6. The Court goes on to also reference habeas corpus and peaceable assembly as rights that could reach the States through the Clause. *Slaughter-House*, 83 U.S. (16 Wall.) at 79.

In other words, *Slaughter-House* holds the Privileges or Immunities Clause protects only rights that inhere in federal citizenship. Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the*

Second Amendment Through the Privileges or Immunities Clause, 39 N.M. L. Rev. 195, 227 (2009). It is true that the dissenting Justices in *Slaughter-House* criticized the majority's narrow reading for rendering the Privileges or Immunities Clause to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people to its passage." *Slaughter-House*, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting). But that claim is inaccurate.

Statements even from some dissenting Justices in *Slaughter-House* suggest that it could be read as a disagreement over unenumerated rights (i.e., implied rights) rather than which enumerated rights apply to the States. For example, "we are not bound to resort to *implication* . . . to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States," Justice Bradley insisted. *Id.* at 118 (Bradley, J., dissenting) (emphasis added). "It is in the Constitution itself." *Id.* Although Justice Bradley went on to say he would recognize at least some unenumerated rights in the Clause, *id.* at 119, the gravamen of the Court's disagreement in *Slaughter-House* was over implied rights, and did not foreclose provisions of the Bill of Rights extending to the States. *Slaughter-House* "arguably left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship." *McDonald*, 561 U.S. at 808 (Thomas, J., concurring in part and con[illegible]ring in the judgment).

This Court therefore need not disturb *Slaughter-House* to apply the Excessive Fines Clause to the States through the Privileges or Immunities Clause.

IV. THE COURT MUST OVERRULE *CRUIKSHANK* TO INCORPORATE THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE, AND SHOULD DO SO.

The same cannot be said for *United States v. Cruikshank*, 92 U.S. 542 (1876). There, the Court held that the Assembly Clause of the First Amendment and the right to bear arms in the Second Amendment do not apply to the States through the Privileges or Immunities Clause. *Id.* at 552–53. *Cruikshank* reasoned that an enumerated right found in the Constitution does not extend to the States through the Privileges or Immunities Clause if the right is not "in any manner dependent upon that instrument for its existence." *Id.* at 553. "In other words, the reason the Framers codified the right to bear arms in the Second Amendment—its nature as an inalienable right that pre-existed the Constitution's adoption—was the very reason citizens could not enforce it against States through the Fourteenth." *McDonald*, 561 U.S. at 809 (Thomas, J., concurring in part and concurring in the judgment).

Cruikshank should be overruled. First, numerous enumerated rights in the Constitution have subsequently been extended to the States. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Gitlow v. New York*, 268 U.S. 652 (1925) (free speech). That case speaks broadly about whether the Fourteenth Amendment mandates extending those rights against the States, not clearly disclaiming whether other provisions of the Fourteenth Amendment could accomplish the same result. Second, the two rights at issue in *Cruikshank*—assembly and bearing arms, both of which pre-existed the

Constitution—have been subsequently applied to the States. The Court incorporated the Assembly Clause in *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). The *De Jonge* Court quoted *Cruikshank*, noting with approval only its declaration, "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.* (quoting *Cruikshank*, 92 U.S. at 552) (internal quotation marks omitted). But *Cruikshank* then did not extend that right to apply against States, despite the fact that the Constitution commands that every State have a republican form of government. U.S. CONST. art. IV, § 4. And of course, the Court's recent decision in *McDonald* was a broad-based repudiation of whether the pre-existing right to self-defense should apply to the States through the Fourteenth Amendment. Much of what has transpired in the law since 1876 is irreconcilable with *Cruikshank*.

One key aspect of stare decisis is "whether the decision was well-reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009). *Slaughter-House* held that the Privileges or Immunities Clause protects rights that are inherent in federal citizenship, and then left open the possibility that those rights include provisions of the Bill of Rights that could apply against the States. *Cruikshank* seems to track the first part of *Slaughter-House* by referring to the relevant Clauses as containing "an attribute of national citizenship," *Cruikshank*, 92 U.S. at 552, but then rejecting the idea that such rights could be actionable against the States. The reasoning of *Cruikshank* has long since been jettisoned by this Court, and its conclusions reversed.

It remains an anachronistic anomaly in constitutional law. It should be explicitly overruled.

V. A FRACTURED COURT WOULD SERVE THE LAW BETTER THAN INCORPORATION THROUGH SUBSTANTIVE DUE PROCESS.

Should a majority of this Court be unable to reach majority consensus on a rationale for applying the Excessive Fines Clause to the States through the Fourteenth Amendment, then it should follow the example of *McDonald*, and leave the question resolved, rather than reaffirm substantive due process with a majority opinion. The Court's long and winding path from substantive due process is one better left alone, instead of perpetuated.

In 1897, the Court incorporated the Taking Clause into the Due Process Clause because it was "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice." *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). When denying incorporation of the Self-Incrimination Clause a decade later, the Court looked to "immutable principles of justice which inhere in the very idea of free government which no member of the Union may ignore. *Twining v. New Jersey*, 211 U.S. 78, 102 (1908) (internal quotation marks omitted). A quarter-century later, the Court considered whether the right was "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Synder v. Massachusetts*, 291 U.S. 97, 105 (1934). For years after that, the Court in *Palko* articulated the test of whether the right is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

But the test continued to shift and morph. In *Duncan*, the Court incorporated the Sixth Amendment's Jury Trial Clause, holding that the question is whether a right is "fundamental to an American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Duncan elaborated that the test for whether a right is fundamental is "whether . . . a procedure is necessary to an Anglo-American regime of ordered liberty." *Id.* at 149 n.14. The following year, the Court applied the *Duncan* test again, and held, "Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled." *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

Benton's rejection of *Palko* is not as straightforward as it might appear. Both cases involved the Double Jeopardy Clause. *Palko* rejected incorporation, 302 U.S. at 328, but *Benton* went the opposite way, incorporating the Clause, 395 U.S. at 796. The *Benton* Court's discussion of the *Palko* framework suggested a repudiation of *Palko*'s rule, reasoning, "*Palko* represents an approach to basic constitutional rights which this Court's recent decisions have rejected." *Id.* at 794. The caveat "insofar" in *Benton*'s sentence overruling *Palko* thus left unanswered whether the Court was overruling *Palko*'s holding that the Double Jeopardy Clause did not apply to the States through the Fourteenth Amendment Due Process Clause, or whether *Benton* was also overruling *Palko*'s test.

The judiciary's best guess on what this Court did about *Palko* in the 1960s was that the "Supreme Court ultimately abandoned this abstract enterprise in favor of a more concretely historical one." *Nordyke v. King*, 563 F.3d 439, 449 (9th Cir. 2009), *vacated en banc on*

other grounds, 611 F.3d 1015 (2010). Judge O'Scannlain continued in his panel opinion, "In *Duncan*, the Court recognized that it had jettisoned the metaphysical musings of *Palko* for an analysis grounded in the 'actual systems bearing virtually every characteristic of the common-law system that had been developing contemporaneously in England and in this country.'" *Nordyke*, 563 F.3d at 449 (quoting *Duncan*, 391 U.S. at 149 n.14).

However, this confusion regarding the proper test was compounded in 1997, when the Court decades later considered whether the Constitution includes an unenumerated right to physician-assisted suicide in *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Court recurred in part to *Palko*, holding that there was no such right because it failed a two-pronged test, that "fundamental rights" are both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 720–21 (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), and *Palko*, 302 U.S. at 325) (internal quotation marks omitted). The Ninth Circuit held that it must be "[g]uided by both *Duncan* and *Glucksberg*," *Nordyke*, 563 F.3d at 451, notwithstanding that *Duncan* had supposedly rejected a test that was later resuscitated in *Glucksberg*, seeming to suggest that the latter's reference to "history and tradition" anchored *Palko*'s "metaphysical musings" into a more objective framework.

The Court revisited fundamental-rights jurisprudence in *McDonald*, deciding whether the Second Amendment right to bear arms recognized in *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008),

applied to the States through the Fourteenth Amendment. The question was typified in nations like Japan, which all parties acknowledged were free countries, but where there is no right to bear arms, and firearm ownership is severely restricted. *See McDonald*, 561 U.S. at 781 (opinion of Alito, J.).

The Court cleaned up aspects of fundamental-rights jurisprudence in *McDonald*. Justice Alito wrote for the majority that the test is "whether the right . . . is fundamental to *our* scheme of ordered liberty," citing *Duncan*, or—apparently as a restatement of that test—"whether this right is deeply rooted in this Nation's history and tradition," *id.* at 767 (internal quotation marks omitted), citing *Glucksberg*. In sum, if a right is deeply rooted in the history and tradition of the United States, that shows it to be part of an Anglo-American regime of ordered liberty, and thus fundamental to our scheme of ordered liberty.

But while concurring with the conclusion that the right to bear arms applies to the States through the Fourteenth Amendment, and is "fundamental" as the Court's precedents defined that term, Justice Thomas declined to join the other four Justices who voted to reverse the lower court in the parts of the opinion employing substantive due process. *Id.* at 805–06 (Thomas, J., concurring in part and concurring in the judgment). "Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause." *Id.* at 806.

CONCLUSION

The judgment of the Supreme Court of Indiana should be reversed, and the case remanded for application of the Excessive Fines Clause.

Respectfully submitted,

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September 11, 2018

No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS, *et al.*,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States through the Fourteenth Amendment?

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Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CoA Institute") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae CoA Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to advance government accountability, transparency, and the rule of law, to protect liberty and economic opportunity, and to educate the public about these matters.[2] As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA Institute has particular interest in challenging government overreach in the criminal justice system, protecting the rule of law, and working to combat the criminalization of conduct that can be addressed through existing civil law, sometimes called "overcriminalization." To fulfill this mission, CoA Institute has, among other things, represented criminal defendants in federal court, e.g., *United States v. Black*, No. 12-cr-00002 (N.D. Cal.),

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1. In accordance with Supreme Court Rule 37.2(a), CoA. All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CoA Institute financially contributed to preparing this brief.

2. CoA Institute, *About*, *www.causeofaction.org/about* (last visited Sept. 10, 2018).

and appeared as *amicus curiae* in criminal matters before this Court and others. *See, e.g., Marinello v. United States*, 584 U.S. __, 138 S.Ct. 1101 (Mar. 21, 2018) (certiorari and merits stages); *Overton v. United States*, 582 U.S. __, 137 S. Ct. 1248 (2017); *United States v. Kolsuz*, 890 F.3d 133, 135 (4th Cir. 2018).

SUMMARY OF THE ARGUMENT

Section 1 of the Fourteenth Amendment expressly prohibits States from abridging privileges or immunities of United States citizens. This Court should hold that the Privileges or Immunities Clause incorporates the Excessive Fines Clause against States. This Court has never ruled on whether section 1 incorporates the Excessive Fines Clause of the Eighth Amendment against the States. This Court has said in *dicta* that the Clause is incorporated. And contrary to the court below, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), this Court has never said or implied otherwise. Differences between modern forfeitures and early American *in rem* practices are legally and constitutionally significant and the latter are no reason not to apply the Excessive Fines Clause against the States. The ancient principle of *salvo contenemento suo* is included in the protection of the Excessive Fines Clause. As a citizen of the United States, therefore, Timbs is privileged and immune from excessive fines, including forfeiture of his vehicle in this case.

STATEMENT OF THE CASE

Tyson Timbs was named as a defendant in two cases brought by the State of Indiana, first a criminal case in June 2013 and then a civil action in August 2013. *See*

State v. Timbs, 62 N.E.3d 472, 474 (Ind. Ct. App. 2016). The criminal case settled: The State dismissed charges of dealing and conspiracy to commit theft and, in exchange, Timbs pleaded guilty to one felony count of dealing a controlled substance and one felony count of theft. *Id.*

This matter arises from the second case, an action against both Timbs and his vehicle, which the State sought to forfeit. Under its forfeiture statute, I.C. § 34-24-1-1 (Supp. 2012), Indiana "must show that a person used the vehicle to transport an illicit substance ... for the purpose of dealing or possessing the substance." *State v. Timbs*, 84 N.E.3d 1179, 1184 (Ind. 2017). After a trial, the court issued written findings that the "amount of the forfeiture sought is excessive, and is grossly disproportional to the gravity of" of the criminality to which Timbs pleaded guilty. *See Timbs*, 84 N.E.3d at 1181 (quoting trial court).

The Indiana Court of Appeals affirmed. *See Timbs*, 62 N.E.3d at 475 ("forfeitures are subject to the Excessive Fines Clause of the Eighth Amendment"). The Indiana Supreme Court reversed "because the United States Supreme Court has not held that the Clause applies to the States through the Fourteenth Amendment." *Timbs*, 84 N.E.3d at 1181. This Court granted the writ.

ARGUMENT

I. THE PRIVILEGES OR IMMUNITIES CLAUSE INCORPORATES THE EXCESSIVE FINES CLAUSE AGAINST THE STATES.

The Excessive Fines Clause of the Eighth Amendment is incorporated against the States through the Privileges

or Immunities Clause of the Fourteenth Amendment. The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A. The Privileges or Immunities Clause of the Fourteenth Amendment Incorporates the Excessive Fines Clause of the Eighth Amendment against the States.

Section 1 of Fourteenth Amendment expressly provides: "No State shall" abridge "the privileges or immunities of citizens of the United States." "On its face, this appears to grant ... United States citizens a certain collection of rights – i.e., privileges or immunities – attributable to that status" as U.S. citizens. *See McDonald v. City of Chicago*, 561 U.S. 742, 808 (2010) (Thomas, J., concurring in part and concurring in judgment).

The terms "privileges" and "immunities" were both understood as synonyms for "rights," whether they were used alone or paired, and have been used interchangeably with "rights" since the time of Blackstone. *See Id.* at 822 (Thomas, J., concurring) (first clear insight into "meaning of the Privileges or Immunities Clause in § 1" is that the terms "'privileges' and 'immunities' were synonyms for 'rights.'"); *see also* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 Geo. L.J. 1241, 1256-57 (2010) (cited in *McDonald*, 561 U.S. at 815) (Thomas, J., concurring)); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *125-129.

The ratifying public likely understood that the Fourteenth Amendment would make the "collection of rights ... attributable to" holding United States citizenship enforceable against the States and not just the federal government. *See McDonald*, 561 U.S. at 808 (Thomas, J., concurring). Public debates about ratification of the Fourteenth Amendment "indicate that § 1 was understood to enforce constitutionally declared rights against the States, and they provide no suggestion that any language in the section other than the Privileges or Immunities Clause would accomplish that task." *McDonald*, 561 U.S. at 833 (Thomas, J., concurring); *see also id.* at 837 (Thomas, J., concurring) ("evidence plainly shows that the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights").

The Revolutionary and Reconstruction public understandings of constitutional rights encompassed by the Privileges or Immunities Clause both included, of course, the right to be free from excessive fines. Indeed,

the imposition of excessive fines was among the many breaches by which King James the Second was accused of "endeavor[ing] to subvert . . . the laws and liberties of this kingdom."[3] Thus, the Act of Parliament by which William and Mary acceded to the throne included a provision against the imposition of excessive fines. A hundred years later, a similar provision was commonly addressed in state constitutions and declarations of rights. *See, e.g.*, PA CONST. OF 1776, §§ 29, 38, 39, Thorpe 5:3089, 3090;[4] Delaware Declaration of Rights, 11 Sept. 1776 Sources 338—40;[5] Virginia Declaration of Rights, 12 June 1776, Mason Papers 1:287—89;[6] MASS. CONST., 2 Mar. 1780,

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3. *An Act for Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown*, Bill of Rights 1 W. & M., 2d sess., c. 2 (Dec. 16, 1689), available at http://press-pubs.uchicago.edu/founders/documents/v1ch14s6.html.

4. The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America. 7 vols. (Francis Newton Thorpe ed., 1909) Washington, D.C.: Government Printing Office, 1909.

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Handlin 441—72;[7] North Carolina Ratifying Convention, Declaration of Rights and Other Amendments, 1 Aug. 1788, Elliot 4:242--46, 248—49.[8] And, the writings of Brutus included a bar against excessive fines as necessary to the security of liberty. Brutus, no. 2, 1 Nov. 1787, Storing 2.9.23--33[9]. This concern for protecting against the imposition of excessive fines had not abated at the time of the Civil War. Kansas, the last state admitted to the Union before war broke out, included an excessive fines prohibition in its Bill of Rights, as did the two states, West Virginia and Nevada, that were admitted to the Union while the war was raging. Ks. Const., Bill of Rights § 9 (1961) (maintained by KS Sec. of State); W. Va. Const. art. II, ¶ 2 (maintained by WV Dep't of Arts, Culture & History); Nev. Const., art. I, §6 (maintained by NV Legislature). Freedom from excessive fines was thus

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7. The Founders' Constitution, Volume 1, Chapter 1, Document 6, The University of Chicago Press, http://press-pubs.uchicago.edu/founders/documents/v1ch1s6.html, (citing Handlin, Oscar, and Handlin, Mary, eds. The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780. Cambridge: Belknap Press of Harvard University Press, 1966).

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9. The Founders' Constitution, Volume 1, Chapter 14, Document 26, The University of Chicago Press, http://press-pubs.uchicago.edu/founders/documents/v1ch14s26.html (citing Storing, Herbert J., ed. The Complete Anti-Federalist. 7 vols. Chicago: University of Chicago Press, 1981).

consistently among the privileges and immunities that Englishmen and Americans sought to protect in the two centuries leading up to Reconstruction.

All the post-1855 state constitutions banned excessive fines. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 877 n. 176 (2013). "By the end of 1868, explicit prohibitions on 'excessive fines' existed in thirty-five of thirty-seven state constitutions." *Id.* at 876-77 (citing Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*," 87 Tex. L. Rev. 7, 82 (2008)). The fundamental rights incorporated against the States by the Fourteenth Amendment therefore includes the Eighth Amendment's prohibition against Excessive Fines.[10]

As for the Eighth Amendment, this Court has held that the Excessive Fines Clause encompasses both civil and criminal forfeitures that are extracted as punishment even in part for some offense. *See Austin v. United States*, 509 U.S. 602 (1993) (civil); *Alexander v. United States*, 509 U.S. 544 (1993) (criminal); *see also United States v. Bajakajian*, 524 U.S. 321, 331 n.6 (1998) ("Because some recent federal forfeiture laws have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture, we have held that a modern statutory forfeiture

10. *Cf. McDonald*, 561 U.S. at 776 (plurality opinion) (finding incorporation of Second Amendment based in part on 22 of 37 States' constitutions protecting the right to keep and bear arms in 1868).

is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam.")* (citation omitted). Given the record below, there can be no dispute that the entirety of this case was a means to punish Timbs for crimes over and above those for which the State had settled when he pleaded guilty. *See Timbs*, 84 N.E.3d at 1180-84; *Timbs*, 62 N.E.3d at 473-77; Brief of Appellant at *5-*18, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), No. 27S04-1702-MI-70, 2016 WL 11200867, at *5-*18; Reply Brief of Appellant at *4-*11, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), No. 27S04-1702-MI-70, 2016 WL 7507913, at *4-*11; *cf. Boyd v. United States*, 116 U.S. 616, 633-34 (1886) ("proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal"). Under this Court's Eighth Amendment precedents involving federal actors and the express terms of the Fourteenth Amendment, Petitioner Timbs has an enumerated right as a United States citizen to be free from excessive fines which Indiana cannot abridge through this action.

One touchstone of the Excessive Fines Clause is gross disproportionality between a fine or forfeiture and the gravity of the offense. *See Bajakajian*, 524 U.S. at 337, 339-340 (1998); *see also id.* at 348-49 (Kennedy, J., dissenting). Conceptualizing a violation's severity in terms measurable against property value is certainly not precise but just as certainly not impossible. *See Bajakajian*, 524 U.S. at 336 (rejecting strict proportionality as constitutional standard because "any judicial determination regarding the gravity of a particularly criminal offense will be inherently imprecise"); Nicholas M. McLean, *Livelihood*,

Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 845-46 (2013). Assessing gross disproportionality is a task well within judicial competence, indeed so central to the judiciary's traditional work that Petitioners' right to be free of excessive fines fits entirely within the fundamental right of access to the courts. *See, e.g., United States v. Bieri*, 21 F.3d 819, 824 (8th Cir. 1994) (proportionality is "a fact-specific evaluation"); Erwin Chemerinsky, *The Consitution and Punishment*, 56 Stan. L. Rev. 1049, 1063 (2004) ("a prohibition of 'excessive fines' inherently requires some way of deciding what is too much"). The "right of free access to its ... courts of justice" is a right held by "citizens of this great country, protected by implied guarantees of its Constitution" that is recognized by the majority in *Slaughter-House*, 83 U.S. at 79, as encompassed within the Privileges or Immunities Clause. *See McDonald*, 561 U.S. at 820 n.6 (Thomas, J., concurring). The ability "to enforce rights in the courts" is one of the "great fundamental rights" that come with United States citizenship. Cong. Globe, 39th Cong., 1st Sess. 475 (Sen. Trumbull). The Privileges or Immunities Clause expressly prohibits Indiana from abridging such rights by enforcing its seizure law against Petitioners without regard to the Eighth Amendment's prohibition on excessive fines and forfeitures.

II. PAST JURISPRUDENCE DOES NOT BAR INCORPORATING THE EXCESSIVE FINES CLAUSE THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE.

This Court's decisions in *Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36 (1872), and its immediate progeny pose

no bar to ruling for Petitioners in this case on the basis that the Privileges or Immunities Clause incorporates the Excessive Fines Clause against the States. *See* Brief for Petitioners at 39. This Court's statements outside the *Slaughter-House* context do not suggest otherwise.

A. Neither *Slaughter-House* Nor Any of Its Progeny Bar Judgment for Petitioners.

"Justice Miller's opinion in the *Slaughter-House Cases* left the door open to incorporating federal privileges and immunities, such as those listed in the Bill of Rights, even as it closed the door on the nationalization of the common law." Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 Geo. L.J. 329, 334 (2011) (Lash, *Part II*). In *Slaughter-House*, this Court confronted a Louisiana statute restricting the operation, ownership, corporate structure, pricing discretion, and location of cattle and slaughtering businesses around New Orleans. The petitioners argued that the law violated section 1 of the Fourteenth Amendment, including the Privileges or Immunities Clause, among other constitutional provisions, because it granted an exclusive charter to a private corporation and excluded others from engaging in otherwise lawful occupations. *Slaughter-House*, 83 U.S. at 64 ("it is said that in creating a corporation of this purpose, and conferring upon it exclusive privileges–privileges which it is said constitute a monopoly–the legislature has exceeded its power"). "This Court [was] thus called upon for the first time to give construction to" the Privileges or Immunities Clause. *Slaughter-House*, 83 U.S. at 67.

At the time of *Slaughter-House*, legislative imposition of broad restrictions on regional businesses and occupations after weighing the costs of disruption against health-and-safety and economic goals was a relatively novel exercise of State police power. The statute was also deeply controversial, having been enacted by Louisiana's racially mixed legislature which had been elected through a system imposed by the federal military throughout the Reconstruction South.[11] Little wonder then that the *Slaughter-House* petitioners argued that the Louisiana law violated their privileges and immunities that had been long recognized as rights of every citizen under any government.

A divided Court ruled against the petitioners on narrow grounds, holding that the Louisiana statute did not violate "the rights claimed by" the petitioners because those rights were "not privileges and immunities of citizens of the United States," but rather were within the rights protected by the States. *See* 83 U.S. at 80.[12] But this Court did not rule or suggest more generally that the Privileges or Immunities Clause did not encompass any definable, discoverable, or otherwise judicially articulable and enforceable rights. Quite the opposite.

The Court held that there are two categories of

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11. *See Slaughter-House*, 83 U.S. at 70-71 (noting that States were not granted full participation in federal government until they ratified the Thirteenth Amendment).

12. *Slaughter-House* expressly did not rule on whether the Louisiana law violated that State's constitution because "that question ... would not be open to review in this court." 83 U.S. at 66. So, *Slaughter-House* did not rule that the petitioners had no rights affected by the Louisiana law.

privileges and immunities: those that adhere to citizens of the United States, which are "under the protection of the Federal Constitution" and thus can be enforced against the States; and those that adhere to citizens of a State, and which "rest for their security and protection where they have heretofore rested," *i.e.*, with the States. *See Slaughter-House*, 83 U.S. at 74-75; *see also* Lash *Part II*, 99 Geo. L.J. at 337 ("Miller's insistence that Article IV and Section One protect two distinct categories of rights mirrors the view embraced by the man who actually drafted the Privileges or Immunities Clause.").

The Court provided a detailed exegesis, articulation, definitions, and examples of rights encompassed by the terms "privileges" and "immunities" as used in the Fourteenth Amendment and Article IV of the Constitution. *See Slaughter-House*, 83 U.S. at 76-80. The Court made a point of doing so:

> But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws.

Id. at 79. Among those rights identified by the Court as within the privileges and immunities subject to the protection of the Federal government were: "to come to the seat of government to assert any claim he may have upon the government;" "to seek its protection;" "to share its offices;" "to engage in administering its functions;" to access its seaports; to access the courts; to "demand care and protection of the Federal government over his

life, liberty, and property when on the high seas or within the jurisdiction of a foreign government;" "to peaceably assemble and petition for redress of grievances;" to access the "privilege of the Writ of *habeas corpus*." *Id.* at 79. The list was not intended to be exclusive but illustrative – and clearly relates to rights that are express or implied by the United States Constitution. *Id.* at 79 ("we venture to suggest ***some*** which owe their existence to the Federal government") (emphasis added).

By ruling against the petitioners, *Slaughter-House* thus held only that the Louisiana statute did not violate the Privileges or Immunities Clause or the other federal constitutional provisions the petitioners relied on – ***not*** that the privileges and immunities of citizens of the United States could only be drawn exclusively from the Constitution.

The federal constitutionality of state legislation weighing disruption against health-and-safety and economic goals is rarely raised today. The case at bar involves a different type of statute altogether. This case is about whether a specific forfeiture would be excessive under the Eighth Amendment and therefore unconstitutionally abridge a privilege or immunity of Mr. Timbs under the express terms of Fourteenth Amendment.[13]

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13. *Cf. McDonald v. Chicago*, 561 U.S. 742, 854 (2010) (Thomas, J., concurring) (noting that it was the dissenters in *Slaughter-House* who "would have held that the Privileges or Immunities Clause protected the unenumerated right that the butchers in that case asserted"); *id.* ("Because *[McDonald* did] not involve an unenumerated right, it is not necessary to resolve the question whether the [Privileges or Immunities] Clause protects such rights, or whether the Court's decision in *Slaughter-*

The canonical interpretation and modern progeny of *Slaughter-House* likewise do not bar entering judgment for Petitioners.[14] Neither *United States v. Cruikshank*, 92 U.S. 542 (1875), nor *Saenz v. Roe*, 526 U.S. 489, 503 (1999), address the Eighth Amendment or its Excessive Fines Clause. Here, as in *McDonald*, the "question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here." *McDonald*, 561 U.S. at 813 (Thomas, J., concurring). Therefore, ruling for Petitioners here, whose rights are expressly enumerated in the Excessive Fines Clause of the Eighth Amendment, is not barred by *Slaughter-House* or any of its progeny.

House was correct."). Indeed, the dissenters in *Slaughter-House* would likely have agreed with *amicus* that Petitioners' Eighth Amendment rights were enforceable against Indiana here. *See* Slaughter-House, 83 U.S. at 87 (Field, J., dissenting) (petitioners' position had "some support in the fundamental law of the country").

14. In *McDonald*, the plurality opinion (not to mention Justice Thomas's concurring opinion) noted that "many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation." *McDonald*, 561 U.S. at 756 (plurality opinion); *id.* at 754 (summarizing canonical interpretation as "the Privileges or Immunities Clause protects only those rights 'which owe their existence to the Federal government, its National character, its Constitution, or its laws'" but "other fundamental rights – rights that predated the creation of the Federal Government and that 'the State governments were created to establish and secure' – were not protected by the Clause").

Even if it were otherwise, authoritative interpretation and application of *Slaughter-House* and *Cruikshank* have "changed with time." *See McDonald*, 561 U.S. at 810 (plurality opinion). The initial authoritative interpretation of *Cruikshank*, namely, that rights under the First and Second Amendments were not exclusively tied to the Constitution sufficiently to have been incorporated through the Fourteenth Amendment, no longer holds sway. *See McDonald*, 561 U.S. at 748 (plurality opinion) (private right to bear arms incorporated through the Fourteenth Amendment's Due Process Clause); 561 U.S. at 743-44 (plurality opinion) (since the late 19th century, this Court has not hesitated to hold that some rights within "a Bill of Rights guarantee" are incorporated against the States through the Due Process Clause of the Fourteenth Amendment even though others may not have been) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (free speech) and *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (free press)).

This Court's jurisprudence of the Privileges or Immunities Clause of the Fourteenth Amendment, whether under *Slaughter-House* itself, any of its initial progeny, or its more modern applications, is no barrier to entering judgment for Petitioners.

B. This Court's Statements about Incorporation of the Excessive Fines Clause Do Not Bar Judgment for Petitioners.

Below, the Indiana Supreme Court inaccurately described and fundamentally misinterpreted this Court's statements about the Excessive Fines Clause. *See State v. Timbs*, 84 N.E.3d 1179, 1183 (Ind. 2017). More to the

point, that court's manner of deciding this case, at least as documented in its reported opinion, does not – nor could it ever – meaningfully address the question presented.

Whether a provision of the federal Constitution is enforceable against the States is not an issue that can be authoritatively or persuasively resolved merely by tabulating *dicta*. Rather, "Supreme Court decisions supposedly state the true law as it has always been, rather than changing the law." William Baude, Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. (forthcoming 2018) (July 29, 2018). Ratification of the Fourteenth Amendment either did or did not incorporate the Excessive Fines Clause against the States. Incorporation occurred or not upon ratification, not by means of a later judicial decision. Resolving the question presented by this case therefore requires analysis of first principles, not talismanic verbiage. Yet the Indiana Supreme Court made exactly that mistake. It refused to apply this Court's standards for answering the question presented,[15] and mischaracterized two simple statements by this Court about the Excessive Fines Clause while doing so. *See Timbs*, 84 N.E.3d at 1183 ("Just as *Cooper's* statement that the Excessive Fines Clause is enforceable against the States is dictum, so too is *McDonald's* statement that the Clause is not."). But the Indiana Supreme Court is as bound by the Constitution as this Court and should have ordered the

15. *Compare McDonald*, 561 U.S. at 750 (plurality opinion) (rights incorporated against States are identifiable through "well developed" standards) *with Timbs*, 84 N.E.3d at 1183-84 ("Indiana is a sovereign state within our federal system, and we elect not to impose federal obligations on the State that the federal government itself has not mandated").

constitutionally mandated result. *See* U.S. CONST. art. VI ("This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

This Court's opinion in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001), states that both the Excessive Fines and Cruel and Unusual Punishments Clauses are incorporated. But contrary to suggestions by the Indiana Supreme Court, that statement is *dictum* because it was not necessary to decide the question presented in *Cooper* – namely, the proper standard for appellate review of constitutional challenges to punitive damage awards – not because it relies on a citation to *Furman v. Georgia* which only "involved an application of the prohibition against cruel and unusual punishments." *See Timbs*, 84 N.E.3d at 1182; *see also Cooper Indus.*, 532 U.S. at 426.

For its part, *McDonald* only says that this Court has not yet decided whether the Excessive Fines Clause is incorporated. *McDonald*, 561 U.S. at 765 n. 13 (plurality opinion) ("we have never decided whether ... the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause"). *McDonald's* statement is fully consistent with the actual ruling in *Cooper* and substantially identical to this Court's earlier statement about the Excessive Fines Clause in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) ("we need not answer several questions" including "whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment"). None

of the opinions in *Browning-Ferris*, *Cooper Indus.*, or *McDonald* ever state, suggest, or imply that the Eighth Amendment's Excessive Fines Clause is not incorporated against the States.[16] Contrary statements by the Indiana Supreme Court are unsupportable.

Other precedent, though not controlling, more thoroughly grapples with modern questions about forfeiture and excessiveness, particularly as they are posed in this case under the federal Constitution. *See, e.g.*, *Hamilton v. City of New Albany*, 698 Fed. App'x 821 (7th Cir. 2017) (unpublished) (listed by the court in *Timbs*, 84 N.E.3d at 1183) (vacating summary judgment for city on plaintiff's excessive-fines claim without analysis of

16. Even if tabulating *dicta* about the Excessive Fines Clause were sufficient to answer the question presented, the Indiana Supreme Court's opinion is incomplete inasmuch as it does not mention let alone analyze other opinions in which this Court suggests that the Excessive Fines Clause is incorporated against the States. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (in case about constitutionality of death penalty for child rape, this Court stated, "The Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that 'excessive bail shall not be required, nor excessive fines imposed....'"); *Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality opinion) (in case about lethal injection, this Court stated, "The Eighth Amendment to the Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment, provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'") (citation omitted); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (in case about constitutionality of death penalty imposed on persons between 15 and 18 years old, this Court stated, "The Eighth Amendment provides: 'Excessive bail shall not be required, nor excessive fines imposed.... The provision is applicable to the State through the Fourteenth Amendment.") (internal citations omitted).

incorporation). But the Indiana Supreme Court did not analyze whether or how they might apply in this case, and only recited some of those cases and holdings. The Indiana Supreme Court's opinion below provides no basis for ruling against Petitioners here.

C. Historical *In Rem* Practices are No Bar to Enforcing the Excessive Fines Clause Against Modern Forfeitures.

Founding-era *in rem* forfeitures have been taken as nearly *ipso facto* assurance that modern forfeiture practices are constitutional. *See, e.g., United States v. Ursery*, 518 U.S. 267, 290 (1996); *Bennis v. Michigan*, 516 U.S. 442, 446-448 (1996); *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 119 (1993) (plurality opinion); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682, 684-85 (1974); see also *Leonard v. Texas*, 137 S. Ct. 847, 848, 197 L. Ed. 2d 474, 476 (2017) (Thomas, J., statement respecting the denial of certiorari) ("The Court has justified its unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding."). However, "[s]uch forfeitures sought to vindicate the Government's underlying property right in customs duties, and like other traditional *in rem* forfeitures, they were not considered at the Founding to be punishment for an offense." *United States v. Bajakajian*, 524 U.S. 321, 340 (1998).

But those early *in rem* forfeitures (actions "against a thing") made sense because the essential element of such a claim, much like the doctrine of *res ipsa loquitur*, was that the defendant property as found and seized

carried indisputable evidence of a customs violation, i.e., absence of a duty stamp. The legal fiction underlying *in rem* cases was jurisdictionally sufficient precisely because the essential evidence underlying the claim was both indisputable and borne by the defendant property itself as found and seized without more.

The characteristics of modern forfeiture, on the other hand, are significantly and legally different. See *Leonard*, 137 S. Ct. at 848-49 (Thomas, J., statement). Much modern forfeiture practice targets wholly domestic property that, as found and seized, does not bear similarly indisputable indicia of any violation by its owner, its user, or anyone else. The property itself need not and routinely does not bear any indicia of forfeitability. Evidence essential to winning a modern forfeiture claim routinely arises entirely from other information about the encounter and the property holder, not as in early American practice from the property as found and seized without more.

So here in this case. The essential element of this action, namely, that Petitioner's vehicle was used to transport or possess a controlled substance, was not drawn from any indisputable evidence about the vehicle as found and seized. Far from the definitive absence of a duty stamp, the State's use of the only evidence drawn from the vehicle (its odometer) was in fact vigorously disputed below.[17] And none of the other evidence supporting this

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17. The State speculated that the odometer reading was a result of trips to buy and bring home heroin. *See* Brief of Appellee at *5, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), No. 27S04-1702-MI-70, 2016 WL 9243717, at *5. But the "mileage accumulated on the vehicle does not substantiate the claim of multiple trips" to transport heroin for sale, in large part because Timbs "stated his

forfeiture action arose from the property as found and seized.[18]

Revolutionary era forfeiture is no more the same animal as Indiana's action here than a gecko is a crocodile. In every important way, modern forfeitures such as Indiana seeks here are deprivations which, were it not for overly simplified comparisons to early American *in rem* practices, would otherwise require prior due process under both the Fifth and Fourteenth Amendments. See *Bennis*, 516 U.S. at 454 (Thomas, J., concurring).

III. FORFEITURE IN THIS CASE WOULD VIOLATE THE PRINCIPLE OF *SALVO CONTENEMENTO*.

If there were any doubt that enforcing the State's seizure of Timbs's vehicle would violate the Privileges or Immunities Clause, the venerable provenance and fundamental nature of the rights protected by that Clause independently confirm their enforceability against Indiana. Among those ancient protections is the right to be free from destructive fines and penalties. Timbs's federally enforceable privileges and immunities against

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sister lived in Ohio and he visited her. Those trips would explain the mileage on the vehicle." *Id.* at *8.

18. *See id.* at *3 ("complaint seeking forfeiture did not allege repeated use of the vehicle to transport heroin as the basis for the requested forfeiture but only referred to one offense on or around May 31, 2013 ... as the basis for the requested forfeiture"); *see also id.* at *4 ("The complaint for forfeiture only relied on one act as the basis of the forfeiture. The state did not amend its complaint nor request that it be amended to conform to the evidence."); *id.* at *8 ("Other than the controlled buys there was no evidence he made any other sales of drugs.").

Indiana's power to impose fines and forfeitures include the fundamental right to maintain his independent, basic economic viability.

Allowing Indiana to enforce its seizure of the vehicle through this action would violate the ancient principle of *salvo contenemento suo*. Blackstone described the concept thus:

> The reasonableness of fines in criminal cases has also been usually regulated by the determination of magna carta, concerning amercements for misbehaviour in matters of civil right. *"Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti;* ***salvo contenemento suo****: et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur, salvo wainagio suo."* A rule, that obtained even in Henry the second's time, and means only, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry.

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *372-73 (1769) (emphasis added).

When this Court first applied the Excessive Fines Clause in *United States v. Bajakajian*, 524 U.S. 321, 327 (1998), it noted that the English sources for the prohibition

against excessive fines encompass punishments that exceed a defendant's ability to pay. 524 U.S. at 335-36 (describing and quoting Magna Charta's prohibition against fines that would "deprive a wrongdoer of his livelihood"). Although *Bajakajian* focusses on gross disproportionality between a fine and the culpability of the defendant as the constitutional limiting factor in that case, it expressly noted that defendant had not argued, and the district court had made no finding regarding, the relationship between the fine and the defendant's ability to pay. 524 U.S. at 340 n.15. *Bajakajian* therefore left unresolved the question of whether, in cases where it matters, punishment should also be weighed against an individual's ability to pay. *See Bajakajian*, 524 U.S. at 354-55 (Kennedy, J., dissenting) ("The Court's holding may in the long run undermine the purpose of the Excessive Fines Clause. One of the main purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor's prison."); *id.* ("concern" about inability to pay "is not implicated here—for of necessity the money is there to satisfy the forfeiture"); *see also, e.g., One 1995 Toyota Pick-Up Truck v. Dist. of Columbia*, 718 A.2d 558, 565 n. 15 (D.C. 1998) (*Bajakajian* "left open the prospect that other factors may be included in the proportionality analysis, such as the wealth of the owner of the property and the effect of the forfeiture on his or her livelihood"); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947) (reducing $3.5 million criminal contempt fine to $700,000 in light of defendant's financial resources to avoid excessiveness).

The prohibition in the Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689." *Bajakajian*, 524 U.S. at 335 (citing *Browning Ferris*

Indus. of Vt. v. Keco Disposal, Inc., 492 U.S.257, 266-67 (1989)). That Bill took aim at certain abuses of the Stuart kings and their judges, including fines that were "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land." *Id.* at 335 (citations and quotations omitted).

> Magna Charta—which the Stuart judges were accused of subverting—required only that amercements (the medieval predecessors of fines) should be proportional to the offense and that *they should not deprive a wrongdoer of his livelihood*: A free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, *saving to him his contenement*; and a Merchant likewise, *saving to him his merchandise*; and any other villain than ours shall be likewise amerced, *saving his wainage*.

Bajakajian, 524 U.S. at 335-36 (emphases added) (citations and quotations omitted).

"As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen. They consistently claimed the rights of English citizenship in their founding documents, repeatedly referring to these rights as 'privileges' and 'immunities.' ... As tensions between England and the Colonies increased, the colonists adopted protest resolutions reasserting their claim to the inalienable rights of Englishmen. Again, they used the terms 'privileges' and 'immunities' to describe these rights." *McDonald v. Chicago*, 561 U.S. 742, 817 (2010) (Thomas, J. concurring);

see also id. at 768 (plurality opinion) (noting Blackstone's assertion that right to keep and bear arms was "one of the fundamental rights of Englishmen") (citations and quotations omitted). As set forth above, these fundamental rights included Magna Carta's and the 1689 English Bill of Right's prohibition on excessive fines, "including both its proportionality principle and the limiting principle of *salvo contenemento.*" *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 865-66 (2013); *see also* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 321 (2014) (Magna Carta includes "specific orders that defendants not be ruined by fines - that their ability to maintain a livelihood be saved - which is a separate and distinct consideration from the proportionality between the harm caused and the penalty imposed"). Early colonial charters, the commentaries of English influencers on American legal thought, and the written work of founding luminaries are replete with references to the inherent limitation on fines and forfeitures that *salvo contenemento* had provided for centuries. *See* McLean, *Livelihood*, *supra.* at 866-870.

When the Eighth Amendment was ratified, therefore, its Excessive Fines Clause, as a matter of common understanding, encompassed the protection of *salvo contenemento.* Its basic principle – "that a fair and just monetary penalty requires not just some form of proportionality between penalty and offense, but also the protection of a minimum core level of economic viability for persons against whom penalties are assessed, determined with some reference to the individual's personal economic circumstances – were unquestionably recognized as fundamental rights at common law by the seventeenth

and eighteenth centuries." *Id.* at 901.[19] This understanding continued through Reconstruction and ratification of the Fourteenth Amendment. "[T]he historical evidence suggests the phrase 'excessive fines' continued to be understood – even in the post-Civil War era – as a unique term of art tied to the meaning of older English provisions barring 'excessive fines.'" *Id.* at 883 (citing and explaining, among other contemporary sources, Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF AMERICAN UNION (1868) (citing Magna Carta's principle of *salvo contenemento* as part of "the merciful spirit" of excessive fines clauses of constitutions of the States)). The common understanding at the time of its ratification was that the Fourteenth Amendment, by incorporating the Eighth Amendment's ban on excessive fines, limited the States' power to impose fines and forfeitures through the doctrine of *salvo contenemento*.

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19. Loss of a car can deprive an indigent person of the ability to earn a livelihood. *See* Matthew Gillespie, *Shifting Automotive Landscapes: Privacy and the Right to Travel in the Era of Autonomous Motor Vehicles*, 50 Wash. U. J. of L. & Policy 147, 166 (2016) ("Personal transportation ... is often necessary for employment, healthcare, and other basic needs of an individual. For many, there are no feasible alternatives to personal transportation."). In this case, forfeiture would also be a direct restriction on Timbs's fundamental right to travel. *See Crandall v. Nevada*, 73 U.S. 35, 39 (1868) (holding unconstitutional state tax levied on persons residing in State who wish to travel out of it "by the common and usual modes of public conveyance"); *see also Edwards v. California*, 314 U.S. 160, 172 (1941) (holding unconstitutional state law prohibiting transportation into state of indigent persons, including "persons who are presently destitute of property and without resources to obtain the necessities of life").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Indiana Supreme Court.

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No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
INDIANA SUPREME COURT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber and its members have a strong interest in ensuring a fair and predictable legal environment across the United States. Unfortunately, and with increasing frequency, state and local legislatures are authorizing – and executive officials are seeking – excessive fines and forfeitures[2] for relatively modest violations of the law by businesses and individuals. While the Eighth

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[1] Counsel of record for all parties received timely notice of the intent to file this brief and consented to the filing of the brief. S. Ct. R. 37(2)(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] Under this Court's Excessive Fines Clause jurisprudence, "[f]orfeitures—payments in kind—are . . . 'fines' if they constitute punishment for an offense." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998).

Amendment's Excessive Fines Clause restricts excessive fines arising under federal law, some jurisdictions' failure to apply that constraint to state and local governments is needlessly driving up costs for businesses, increasing prices for consumer goods and services, and undermining economic growth. The Chamber thus has a particular interest in ensuring that the Excessive Fines Clause is held applicable to the States.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Eighth Amendment prohibits "excessive sanctions." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (internal quotation marks omitted). In a series of twentieth-century opinions, the Supreme Court held much of the Bill of Rights applicable to the States, including two-thirds of the Eighth Amendment's guarantees against excessiveness. *See Robinson v. California*, 370 U.S. 660, 675 (1962) (prohibiting cruel and unusual punishments); *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (prohibiting excessive bail). Consistent with these decisions, this Court affirmatively stated in 2001 that the "Due Process Clause . . . makes the Eighth Amendment's prohibition against excessive fines . . . applicable to the States" as well. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433–34 (2001). But a footnote in a more recent decision, *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 765 n.13 (2010), unsettled the issue by suggesting that the Court has yet to decide whether the Excessive Fines Clause applies to the States.

The case currently before the Court underscores why *Cooper Industries* was correct. And the disproportionate and punitive forfeiture in Petitioner's case is hardly unique. Across the country, state and local prosecutors are targeting large and small businesses for similar treatment. Newspapers and legal literature from the 1980s forward are replete with examples of large fines being handed out for even the most inconsequential violations – at great cost to businesses and their customers.

Many of the same excesses that originally led to the federal constitutional prohibition are thereby presenting themselves forcefully in states that have not recognized the Clause's incorporation. And often, state and local prosecutors have pursued excessive sanctions for the government's financial benefit rather than meting out justice fairly and proportionately to the harm caused by the underlying offense.

The solution to this problem is straightforward. The Founders recognized the judiciary as the last line of defense against legislative excess and overzealous prosecution. This Court should embrace the judicial branch's role in reviewing fines and other monetary sanctions for excessiveness. *Cooper Industries'* conclusion should be reaffirmed, and the Eighth Amendment's Excessive Fines Clause and its concept of proportionality should be held applicable to the States.

ARGUMENT

I. EIGHTH AMENDMENT REVIEW OF STATE FORFEITURES AND FINES IS A CONSTITUTIONALLY NECESSARY CHECK ON ABUSE.

A. The Excessive Fines Clause Is Precisely the Type of Constitutional Provision That Should Be Incorporated.

Individual components of the Bill of Rights are incorporated against the States where a provision is "fundamental to *our* scheme of ordered liberty" or where the right is "'deeply rooted in this Nation's history and tradition.'" *McDonald*, 561 U.S. at 767 (citation omitted); *see also Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940). Both are true here.

It is a basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). In fact, this "enduring principle" was long ago embedded into the Magna Carta, Andrew M. Kenefick, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699, 1716 (1987), and reaffirmed by key thought leaders during The Enlightenment. While the "sovereign's right to punish crimes is founded . . . upon the necessity of defending the public liberty," Cesare Bonesana-Beccaria wrote in his quintessential work on crime, the "punishments [must be] just in proportion as the

liberty, preserved by the sovereign, is sacred and valuable." Cesare Bonesana-Beccaria, *An Essay on Crimes and Punishments*, at 17 (1872 ed.).[3]

The Founders learned lessons from the past, when these principles were not resolutely entrenched into law. As a result, a "primary focus" of their efforts in drafting the Constitution and Bill of Rights "was the potential for governmental abuse of its 'prosecutorial' power." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989). Based on past abuses, the Founders wanted a clear limit on "the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Id.* at 267. Among other models, the Founders turned to the English Bill of Rights of 1689, which was designed "to curb the excesses of [17th century] English judges" who were imposing "partisan" and "heavy fines on the King's enemies." *Id.*

Against this general background, the Framers of the Bill of Rights lifted the Eighth Amendment "almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived

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[3] http://lf-oll.s3.amazonaws.com/titles/2193/Beccaria_1476_Bk.pdf. Notably, "Beccaria's writings materially informed the Founding Fathers' attitudes and views of the provisions of the federal Bill of Rights." *Louis S. Rulli, Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111, 1113 n.2 (internal quotations and brackets omitted) ("*Excessive Punishment in Civil Forfeiture*").

from the [aforementioned] English Bill of Rights of 1689." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

While Congress did not debate the Eighth Amendment's language directly to any meaningful extent in 1791, *see Browning-Ferris*, 492 U.S. at 264, contemporary advocates spoke out and wrote approvingly about its principles. For example, during the original Virginia Ratifying Convention in 1788, Patrick Henry argued that it would "depart from the genius of your country" to adopt a Constitution without a restriction on excessive fines. Patrick Henry, *Debate in Virginia Ratifying Convention*, (June 16, 1788).[4] "[W]hen we come to punishments," Henry continued, "no latitude ought to be left [to legislatures to] . . . define punishments without this control." *Id.* A prominent pre-ratification author likewise linked the importance of placing excessiveness-related constraints on both the federal and state governments:

> For the security of liberty it has been declared, "that excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted. . . ." These provisions are as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing

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[4] http://press-pubs.uchicago.edu/founders/documents/amendVIIIs13.html.

> fines, inflicting punishments, . . . and seizing . . . property . . . as the other.

Louis S. Rulli, *Excessive Punishment in Civil Forfeiture*, 19 U. Pa. J. Const. L. at 1115 (quoting Brutus II (Nov. 1, 1787), as reprinted in *The Complete Bill of Rights* 621 (Neil H. Cogan, ed., 1997)).

Given this "traditional understanding of protection from excessive fines as inherent in English fundamental law, and in light of the fact that protections against 'excessive fines' are among the most ancient rights of the Anglo-American legal tradition, it can scarcely be argued that such rights are not 'deeply rooted in this Nation's history and tradition.'" Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 875 (2013) (citation omitted); *see also Solem v. Helm*, 463 U.S. 277, 284–88, 313 (1983) (observing that the "constitutional principle of proportionality has been recognized explicitly in this Court for almost a century").

Historic support for incorporation is also quantifiable. By 1791, the constitutions of Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia all contained prohibitions on excessive fines, as did the Northwest Ordinance of 1787. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. at 876. And by the year the Fourteenth Amendment was adopted, 35 states – accounting for nearly 92% of the population – had incorporated their own version

of an excessive fines prohibition into their constitutions. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 82 (2008).[5]

This is why, as Petitioners detailed in their brief petitioning for a writ of certiorari (at 13-18 & n.5), many state and federal courts have concluded that it is "beyond serious dispute" that the Excessive Fines Clause applies to the States – particularly so given this Court's past statements to this effect. Just four years after seven justices signed onto the opinion in *Cooper Industries*, the Court reaffirmed in *Roper v. Simmons*, 543 U.S. 551, 560, 589 (2005), that the entirety of the Eighth Amendment "is applicable to the States through the Fourteenth Amendment." And in 2008, the Court again held that the "National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States" – including the Excessive Fines Clause – and that "all

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[5] In fact, prior to the Fourteenth Amendment, one prominent author had even argued for applying the Eighth Amendment's ban on excessive fines to the States of its own force. In his 1825 treatise, William Rawle wrote that the prohibition on excessive fines was "founded on the plainest principles of justice, and alike obligatory on the legislatures and judiciary tribunals of the states and of the United States." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 878 n.178 (2013) (quoting William Rawle, *A View of the Constitution of the United States of America* 125 (1825)).

persons within those respective jurisdictions may invoke its protection." *Kennedy v. Louisiana*, 554 U.S. 407, 412, 419, as modified on denial of reh'g, 554 U.S. 945 (2008). Other justices' individual opinions also have referred back to the Excessive Fines Clause's incorporation post-*Cooper Industries*.[6]

Discerning excessiveness is a vital judicial function. A hallmark of the American constitutional system is the creation of "an independent judiciary [as] the ultimate reliance of citizens in safeguarding rights guaranteed by the Constitution" over and beyond the legislative and executive branches. *Levine v. United States*, 362 U.S. 610, 616 (1960). This Court long ago recognized "the duty of the courts to adjudge such penalties to be within the constitutional prohibition" of the Eighth Amendment. *In re Kemmler*, 136 U.S. 436, 446 (1890). In fact, "by broadly prohibiting excessive sanctions, the Eighth Amendment [actually] directs judges to exercise their wise judgment in assessing the proportionality of all forms of punishment." *Ewing v. California*, 538 U.S. 11, 32–35 (2003) (Stevens, J., dissenting). And this Court has made clear that the responsibility lies "[u]pon the state courts, equally with the courts of the Union, . . . to guard, enforce, and protect every right granted or secured by the constitution of the United States." *Robb v. Connolly*, 111 U.S. 624, 637 (1884).

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[6] *See, e.g., Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality); *Miller v. Alabama*, 567 U.S. 460, 503 (2012) (Thomas, J., dissenting).

B. Incorporating the Excessive Fines Clause Will Prevent Indiana, and Other States, from Ignoring an Essential Element of Ordered Liberty.

"The purpose of the Eighth Amendment . . . was to limit the government's power to punish," with the Excessive Fines Clause forming an integral part of the Amendment's three-part framework by "limit[ing] the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (quoting *Browning-Ferris*, 492 U.S. at 265). It "would be anomalous indeed" if other sanctions under the Eighth Amendment were subject to review under federal constitutional principles but excessive fines were not. *Solem*, 463 U.S. at 289.

As detailed below, state and local prosecutors have sought to extract grossly disproportionate fines from disfavored or unpopular parties – like large corporations – who presumably have the resources to pay, rather than seeking sanctions in proportion to the harms caused by their actions. But such schemes, unbound to fundamental constitutional principles of proportionality, defeat the broader goals behind the Eighth Amendment and this Court's decision to incorporate its other clauses against the States. This Court should not allow overzealous prosecutors or legislators to effectively do away with fundamental constitutional rights.

II. The Unchecked Proliferation of Disproportionate Forfeitures and Revenue-Seeking Fines Undermines Economic Growth.

A. Mandatory Forfeitures Are Increasingly Common and Problematic.

Penalty statutes – and in particular here, statutes imposing fines and forfeitures – are often drafted with the worst prospective offender in mind. As commentators have noted, penalty amounts have "tended to be quite high because legislatures have used a 'worst case' mentality in setting them." Robert O. Dawson, *Sentencing Reform: The Current Round Toward a Just and Effective Sentencing System: Agenda for Legislative Reform. by Pierce O'Donnell, Michael J. Churgin & Dennis E. Curtis.* New York: Praeger Publishers, 1977. pp. xvi, 88 Yale L.J. 440, 442 (1978) ("*Sentencing Reform*"). For example, in the early 1970s, Congress passed legislation, including the Racketeer Influenced and Corrupt Organizations Act, which authorized forfeiture of property connected to the criminal enterprise. These laws – and other statutes like them in the years since – were an "'extraordinary' weapon" against those who had significant involvement in organized crime, but they did not take into account the unfairness that such "drastic" measures would have against others with less culpability. *Russello v. United States*, 464 U.S. 16, 27 (1983) (quoting 16 Cong. Rec. 819 (1970)).

The responsibility for reviewing fines to ensure that they are not grossly disproportionate to the

alleged wrongdoing lies principally with the judiciary. In fact, legislatures rely upon trial judges "to mitigate the severity of punishment in the great majority of cases." Robert O. Dawson, *Sentencing Reform*, 88 Yale L.J. at 442. And a key part of that analysis in many jurisdictions is the Excessive Fines Clause.

Incorporation of this provision imposes a duty on state courts to go beyond whether a fine is authorized under state law and ask whether it is appropriate in the actual circumstances before the court. Without this additional check, the resultant financial penalties can offend basic notions of fairness and over-compensate for the conduct the legislature was attempting to prevent in the first place.

B. Governments Are Increasingly Misusing Mandatory Forfeitures and Fines as Revenue Streams Rather Than as Proportionate Punishments for Particular Offenses.

Fines and related forfeitures are on the rise in America, as are state and local government's reliance on – and abuse of – such enforcement mechanisms. *See, e.g.*, David J. Stone, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. Rev. 427, 429-30 (1993). In 1991, a Justice Department memorandum observed that "state and local law enforcement agencies were becoming increasingly dependent upon equitable sharing of forfeiture proceeds," with nearly $1.4 billion in assets transferred to the agencies as of 1994. Eric

Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 64 (1998). By 2017, "[f]orfeitures, particularly civil forfeitures, have become a powerful tool for the Department of Justice, as well as for local law enforcement agencies," with dollar amounts far exceeding totals from the 1990s. David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures* ("*Forfeitures*"), 11 Harv. L. & Pol'y Rev. 541, 541–42 (2017).

For their part, local officials now openly boast about their profit-making enterprises and engage contingent fee private attorneys to pursue them. *See, e.g.*, Br. for *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Petitioner, *Endo Pharmaceuticals v. New Hampshire*, No. 17-633 (U.S. Nov. 30, 2017).[7] In fact, a "national study found 60 percent of the 1,400 municipal and county agencies surveyed across the country relied on forfeiture profits as a 'necessary' part of their budget." Barnini Chakraborty, *Despite Promises to Cut Back, Fed and State Governments Press Asset Forfeitures*, Fox News, Jan. 30, 2018.[8] The Las Cruces, New Mexico city attorney bragged that, through civil forfeitures:

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[7] http://www.chamberlitigation.com/sites/default/files/cases/files/17171717/U.S.%20Chamber%20Amicus%20Brief%20--%20Endo%20Pharmaceuticals%20Inc.%20v.%20New%20Hampshire%20%28U.S.%20Supreme%20Court%29.pdf.

[8] http://www.foxnews.com/politics/2018/01/30/despite-promises-to-cut-back-fed-and-state-governments-press-asset-forfeitures.html.

> "We could be czars. We could own the city. We could be in the real estate business." He detailed how police targeted nice vehicles and other desirable assets, but that they should pursue bigger fish: "This is a gold mine! A gold mine! You can seize a house, not a vehicle!"

David Pimentel, *Forfeitures*, 11 Harv. L. & Pol'y Rev. at 550.

Not only are the fines and forfeitures sought by state and federal governments massive in the aggregate, but the fines on a case-by-case are equally as staggering, sometimes reaching "into the billions of dollars against a single entity." U.S. Chamber Institute for Legal Reform, *Constitutional Constraints: Provisions Limiting Excessive Government Fines* at 1 (Oct. 2015).[9] For example, the State of New York and the City of New York recently sought $872 million in penalties – and were awarded $247 million – against UPS because a small number of sellers used UPS's services to ship untaxed cigarettes. Anthony Noto, *UPS Vows to Fight $247M Penalty for Shipping Untaxed Cigarettes in New York*, New York Business Journal (May 26, 2017).[10] At the opposite end of the country, Hunt County, Texas hired private attorneys who sought approximately $2 billion

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[9] http://www.instituteforlegalreform.com/uploads/sites/1/ConstitutionalConstraints_web.pdf.

[10] https://www.bizjournals.com/newyork/news/2017/05/26/ups-vows-to-fight-247m-penalty.html.

in fines from a landowner for improperly storing a pile of wood on his property. *See* U.S. Chamber Litigation Ctr., *Grady v. Hunt Cty., Texas.*[11] In other examples, Arkansas and Louisiana retained private counsel to pursue aggressive claims against a Johnson & Johnson subsidiary, initially resulting in $1.2 billion and $330 million verdicts. *See* Br. for *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Petitioner, *Endo Pharmaceuticals v. New Hampshire* at 11. Ultimately, these verdicts were overturned and the States recovered nothing, but the final result in these two cases does not diminish the impact and enormity of the penalties that state and local governments are seeking via these types of cases. *See id.*

Moreover, business entities are frequently subject to multiple fines by different government actors for the same conduct. U.S. Chamber Institute for Legal Reform, *Constitutional Constraints: Provisions Limiting Excessive Government Fines*, at 1. For example, the South Carolina Supreme Court recently upheld a $124 million civil penalty award in a case brought by the South Carolina Attorney General against Johnson & Johnson for the same purported misconduct regarding a drug that was already the subject of the company's $2.2 billion settlement with the federal government. *Id.* at 5. "If the other 49 states followed South Carolina's lead, it

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[11] http://www.chamberlitigation.com/cases/grady-v-hunt-county-texas.

would amount to over $6 billion in civil fines on top of the federal government's $2.2 billion settlement." *Id.*

Fines are also hurting small businesses, in particular, with the "explosion of civil forfeiture cases [bringing] with it persistent allegations of abuse." Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111, 1120 (2017) ("*Excessive Punishment in Civil Forfeiture*"). For example:

> The CBS television show, 60 Minutes, highlighted the plight of Willie Jones, a black landscaper who was stopped at the Nashville airport after being observed paying cash for his airline ticket. Law enforcement authorities detained Mr. Jones and seized $9,000 in cash from his person because, according to police, he matched the profile of a drug courier. In fact, he was traveling to Texas to buy shrubs for his landscaping business and needed cash to do so. Nonetheless, police confiscated his $9,000, and released him without ever charging him with a crime. Mr. Jones sued the government to get his money back and ultimately prevailed, with the presiding judge noting that "the statutory [forfeiture] scheme as well as its administrative implementation provide[d] substantial

> opportunity for abuse and potentiality for corruption."

Id.

In New York City, small businesses "flooded [then-Public Advocate Bill de Blasio's] office with complaints of being hounded for minor offenses and [being] forced to pay 'excessive' fines." Jessica Dye, *NY Public Advocate Slaps City with Lawsuit over Fines*, Reuters (July 26, 2012). With the City's estimated fine revenue doubling from $400 million to $800 million in a ten-year period, de Blasio sought "answers about what this 'fine first, ask questions later' enforcement is doing to our small businesses and their ability to survive in this economy." *Id.* *See also* Erin Durkin, *Newkirk Plaza Merchants Hit with Fines as de Blasio Pushes City to Ease Up on Small Businesses*, N.Y. Daily News, Apr. 25, 2012; *Prince v. City of New York*, 108 A.D.3d 114 (2013) (explaining how the New York City sanitation police fined a carpenter/artist $2,000 and had his work-related vehicle impounded for removing "a single television antenna from the top of some curbside garbage bags").[12]

The fines have had particularly deleterious effects on New York's "[i]mmigrant entrepreneurs," who find themselves faced with a "harsh enforcement of non-critical violations [that] are creating unnecessary obstacles to small business success."

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[12] http://www.nydailynews.com/new-york/brooklyn/newkirk-plaza-merchants-hit-fines-de-blasio-pushes-city-ease-small-businesses-article-1.1067535.

Office of Bill de Blasio, *Report de Blasio: City Budgets Drowning Small Businesses in Frivolous Fines* (Apr. 25, 2012).[13] For example, one proprietor of a Korean restaurant shut his doors following "years of excessive fines" for violations concerning his dishwasher's size and an occasional broken tile. Melissa Etehad, *Small Business Owners in Flushing Say the City Unfairly Targets Them*, TheInk.NYC (Oct. 6, 2015).[14] The former restauranteur, a leader in the local business association, went on to express concern that city inspectors were taking advantage of a language barrier among immigrant entrepreneurs to issue fines without the proprietor being able to argue back or fully comprehend the regulatory requirements. *See id.*

Similar accounts of excessive fines against business owners exist all across the country. In Los Angeles, for example, the city ordered Carl's Jr. to pay $1.45 million in restitution and penalties because the fast food chain failed to pay some employees an additional $0.25 or $0.50 to meet the updated local minimum wage. James Peltz, *Los Angeles Seeks $1.45 Million from Carl's Jr. for Alleged Minimum Wage Violations*, Los Angeles Times (June 26, 2017). The total amount actually owed to the employees in back pay: $5,400.

Chicago regulations call for fines of $350 to $15,000 *per sign, per day* against small businesses

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[13] http://www.maketheroad.org/article.php?ID=2359.

[14] http://theink.nyc/small-business-owners-in-flushing-say-the-city-unfairly-targets-them/.

that post unauthorized signs like "ATM Inside" or "Breakfast, Lunch & Dinner" on the front window of their convenience store or restaurant. April Leachman, *When It Come to Sign Violations in Chicago, It's All About the Dollar Signs*, ChicagoNow.com (Sept. 11, 2017).[15] Under this policy, one Chicago dry cleaner was threatened with a $1,000 daily fine for a painted window sign that advertised wedding dress cleaning and leather repair. Alisa Hauser, *City Slaps Fines on Businesses for Putting Signs on Windows Without Permits*, DNAInfo.com (July 28, 2017).[16] While the dry cleaner took down the sign, others did not and owe significant sums to the city in penalties, interest, and administrative and collection fees. Alisa Hauser and Tanveer Ali, *As Sign Violations Spike, "Erratically Enforced" Law Questioned*, DNAInfo.com (Sept. 11, 2017).[17] Residents, community leaders, and at least one city alderman have questioned why the city is cracking down on storefront signs in light of Chicago's other pressing problems. *See* April Leachman, *When It Come to Sign Violations in Chicago, It's All About the Dollar Signs*.

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[15] http://www.chicagonow.com/chicago-on-the-radar/2017/09/when-it-comes-to-sign-violation-citations-in-chicago-its-all-about-the-dollar-signs/#image/1.

[16] https://www.dnainfo.com/chicago/20170728/wicker-park/window-signs-permits-chicago-fines-businessowners-appeal.

[17] https://www.dnainfo.com/chicago/20170911/wicker-park/sign-ordinance-chicago-business-sign-permits-law-window-signs-chicago.

And in Colorado and coastal North Carolina, businesses are fighting against excessive fines levied by state officials involving workers compensation. In one example, a Denver-based hospitality company with an annual payroll of less than $50,000 was fined $841,200 by the Colorado Division of Workers' Compensation for failure to provide the appropriate workers' compensation insurance for several years. *See* Kristen Beckman, *Penalty for Lapsed Comp Coverage Was Excessive, Court Rules*, Business Insurance (Mar. 6, 2017).[18] After "Soon Pak, owner of the company, [argued] that she would be forced to declare both personal and business bankruptcy and shut her business down if the fine was enforced," a Colorado appellate court intervened and found the fine excessive—by applying the Eighth Amendment to state proceedings. *See id.* Separately, in a scenario described as "likely 'representative of situations being faced by hundreds of small businesses across the state,'" a Corolla, North Carolina diner went to court over a similar $86,750 penalty even though the violation was remedied within days of receiving a notice letter from state officials. Jennifer Henderson, *Coastal Carolina Diner Sues State Agency over Workers' Comp Fines*, Triangle Business Journal (June 26, 2017).[19]

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[18] https://www.businessinsurance.com/article/20170306/NEWS08/912312252/Colorado-workers-compensation-fines-Dami-Hospitality.

[19] https://www.bizjournals.com/triangle/news/2017/06/26/coastal-carolina-diner-sues-state-agency-over.html.

All of these examples reflect the type of injustice the Eighth Amendment exists to prevent. "There is good reason to be concerned," Justice Scalia wrote, "that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J.).[20] "Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.*

Indeed, earlier this year the Chief Justice of the Ohio Supreme Court issued a stark warning to her judicial colleagues that courts must be "centers of justice, not automatic teller machines whose purpose is to generate revenue for governments." Letter from Ohio Chief Justice Maureen O'Connor to State Judges (Jan. 29, 2018).[21] Chief Justice O'Connor continued:

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[20] Indeed, even before adoption of the Fourteenth Amendment, officials recognized the particular destructive power of fines on businesses. In an 1864 speech, Pennsylvania Senator Edgar Cowan argued that in order for a fine to be constitutional, it must "save[] . . . to the merchant his merchandise [and] to the villein his wainage." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. at 884 (citing Cong. Globe, 38th Cong., 1st Sess. 561 (1864) (statement of Sen. Edgar Cowan)).

[21] https://www.supremecourt.ohio.gov/SCO/justices/oconnor/finesFeesBailLetter.pdf.

> [C]ourt cases are not business transactions. . . . Judges and court staff cannot be seen as collection agents. Whether courts contribute to a city's bottom line or generate sufficient cash flow for its own operations should not be even a secondary thought considering the role of the judiciary in our system of government. . . . We should not be expected to engage in practices designed to maximize revenue by taking advantage of our citizens or ignoring basic constitutional standards. . . . Practices that . . . impose unreasonable fines, fees, or bail requirements upon our citizens to raise money or cave to local funding pressure . . . are simply wrong.

While a remedy for these problems might lie with state legislatures, they are not always careful guardians of constitutional rights and, in times of budgetary crisis, often look for new avenues to raise funds. Such bodies are "overstocked with lawyers" who have little interest in limiting potential sources of revenue for themselves or their private sector colleagues (in the form of assistance with forfeiture proceedings, for example). *Less Punitive Damages*, Wash. Post, July 11, 1989.[22] Moreover, legislators are often politically reluctant to discontinue a funding

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[22] https://www.highbeam.com/doc/1P2-1200624.html.

stream that substitutes financial punishment for tax increases.

Defendants also cannot always take refuge in state constitutional or statutory prohibitions on excessive fines. Not all states have excessive fines clauses. Moreover, trying to track legal developments and adjust one's business affairs based on fifty different rules for excessive fines is a prohibitively cumbersome jigsaw puzzle for many corporations to solve.

Thus, the only way that the longstanding constitutional principles underlying the Excessive Fines Clause will be applied fairly and uniformly to all businesses and individuals across this country is by a reaffirmation of incorporation by this Court.

C. Excessive Fines, and the Legal Uncertainty Surrounding Whether They May Be Imposed, Hinder Beneficial Economic Activity.

While this case comes to the Court in the context of the State imposing a grossly disproportionate sanction on a single individual, Petitioner is not alone in seeking a fair, uniform standard. The business community and its customers are equally affected.

"Over-punishment can . . . lead to over-deterrence, where businesses become too cautious and refrain from undertaking competitive activity because of fear that the activity may be deemed" a violation of law. John Terzaken & Pieter Huizing, Allen & Overy,

How Much Is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels, at 6 (Spring 2013) ("*How Much Is Too Much*").[23] When corporations face the prospect of excessive financial penalties, products are "withheld from the market by lawsuit-leery companies," L. Stuart Ditzen, *Are Punitive Damage Awards Too Punishing?*, Phila. Inquirer, Oct. 29, 1989, thereby depriving businesses of profitable opportunities and consumers of the products that they might want to purchase. With over 493,000 small businesses and 1,173,626 employees of such businesses in Indiana alone, *see* U.S. Small Business Admin., Office of Advocacy, *Small Business Profile: Indiana*,[24] for example, even modest risk-based adjustments can have a significant impact.

Consumers are affected in other ways. "Excessive fines, designed to punish corporations, will more likely than not hurt consumers by requiring an excessive increase in prices as well as an excessive diversion of resources to prevention activities." Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. Rev. 395, 402 (1991). Moreover, "excessive fines may lead to insolvency . . . , which in certain markets may significantly weaken competition and ultimately hurt consumers in that market." John Terzaken & Pieter Huizing, *How Much Is Too Much* at 6.

The continuing uncertainty in the legal landscape also takes a toll. Among other things, such

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[23] http://awa2014.concurrences.com/IMG/pdf/how_much.pdf.

[24] https://www.sba.gov/sites/default/files/advocacy/IN_0.pdf.

uncertainty increases transaction costs, hinders entrepreneurial investment, and deters consumer purchases. Indeed, "[b]usinessmen . . . require the decisions of the courts on commercial issues to be predictable so that they know where they stand." L. S. Sealy and R J A Hooley, *Commercial Law: Text, Cases and Materials* at 10 (5th ed. 2003). This is particularly true here, where businesses may have their goods and services spanning jurisdictions that recognize the binding effect of the Eighth Amendment and those who do not. As the amount of the excessive fines grows, *see supra* at 12-22, businesses may need to avoid transactions in jurisdictions where businesses are treated unfairly. Such inefficiencies, caused by legal uncertainty and a patchwork of inconsistent legal regimes, do not serve businesses or consumers well.

III. AS UNDER FEDERAL LAW, THIS COURT SHOULD HOLD THAT A STATE OR LOCAL FINE IS EXCESSIVE UNDER THE EIGHTH AMENDMENT WHEN IT IS DISPROPORTIONATE TO THE HARM CAUSED BY THE UNDERLYING OFFENSE.

When reviewing fines imposed under federal law, this Court has already held that the "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. In that case, Mr. Bajakajian's reporting violation did not mask any other currency-related violations and caused no

independent harm to the government's interest. Application of the proportionality principle in the lower court resulted in a reduction of a $350,000 forfeiture based solely on the unreported funds to a $5,000 penalty.

Bajakajian's holding "is deeply rooted and frequently repeated in common-law jurisprudence," *Solem*, 463 U.S. at 284 (collecting authorities), and grounded in the basic "precept of justice that punishment for crime should be graduated and proportioned to offense," *Weems*, 217 U.S. at 367. This Court has "repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment," including in proceedings arising under state law. *Atkins*, 536 U.S. at 311.

Yet this case illustrates how far state and local governments are straying from these fundamental principles. After imposing a proportional criminal fine on Mr. Timbs, Indiana imposed a statutory forfeiture in an amount arbitrarily set by the value of the car Mr. Timbs happened to be driving at the time of the offense. That type of sanction bears little relationship to the offense or the harm being remedied. While Indiana may have articulated other justifications for its forfeiture statute, it is difficult to see this type of add-on punishment as anything other than a revenue-seeking exercise.

This Court, as in *Bajakajian*, should leave it to the lower state and federal courts to make, in the first instance, judgments about whether a specific penalty is excessive under the Eighth Amendment. Consistent with *Bajakajian* and other cases, the

Chamber respectfully submits that lower courts would benefit from a reaffirmance that the standard for adjudicating excessiveness in all cases arising under the Eighth Amendment is assessing the proportionality of the forfeiture imposed to the public harm caused by the triggering violation. *See, e.g.*, *Bajakajian*, 524 U.S. at 335 (citing 1 N. Webster, American Dictionary of the English Language (1828)) (defining "excessive" as "beyond the common measure or proportion").

CONCLUSION

Today the imperative for incorporating the Excessive Fines Clause against the States could scarcely be clearer. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). With excessive fines on the rise, and the burdens on business and individuals growing, this case presents the Court with an opportunity to conclusively resolve the incorporation question and protect all Americans' fundamental right to liberty. This Court should reverse the Indiana Supreme Court's decision and require the Eighth Amendment Excessive Fines Clause's application in state penalty and forfeiture proceedings.

Respectfully submitted,

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September 11, 2018

No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections.

SUMMARY OF ARGUMENT

After Tyson Timbs pleaded guilty to one count of a drug offense, he was sentenced to a year of home detention followed by probation. But the State of Indiana wanted more: it authorized a civil forfeiture action to seize ownership of Timbs's personal vehicle—which was worth four times more than the maximum fine he could have received for his crime—because he drove the vehicle while committing his offense. Pet. App. 2-3, 10-12. Indiana's trial and intermediate courts ruled that imposing this penalty would violate the Excessive Fines Clause of the Eighth Amendment because it was "grossly disproportionate to the gravity of Timbs's offense," *id.* at 24, but the Supreme Court of Indiana refused to consider that argument. Instead, it declared that Indiana, as "a sovereign state within our

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

federal system," has no obligation to obey the Excessive Fines Clause. *Id.* at 9. That conclusion is entirely at odds with the text and history of the Fourteenth Amendment, a measure adopted during this nation's Second Founding to ensure that states do not violate the fundamental liberties enshrined in the Bill of Rights.

Nearly 150 years ago, in the wake of a bloody Civil War, the Fourteenth Amendment transformed the Constitution's protection of individual rights, adding to our nation's charter a sweeping new guarantee of liberty meant to secure "the civil rights and privileges of all citizens in all parts of the republic," *Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xxi (1866), and to keep "whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866) (Rep. Woodbridge).

Proposed in 1866 and ratified in 1868, the Fourteenth Amendment "fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), in order to "repair the Nation from the damage slavery had caused," *id.* at 807 (Thomas, J., concurring in part and concurring in the judgment), and to secure for the nation the "new birth of freedom" that President Abraham Lincoln had promised at Gettysburg, 7 *Collected Works of Abraham Lincoln* 23 (Roy P. Basler ed., 1953). Central to that task was ensuring state adherence to the full range of individual rights enshrined in America's founding documents, including the liberties enumerated in the Constitution and the Bill of Rights.

The Framers wrote the Fourteenth Amendment against the backdrop of a long history of state abridgement of fundamental rights. As Representative Jehu

Baker put it, the Amendment was "a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue." Cong. Globe, 39th Cong., 1st Sess. app. 256 (1866) (Rep. Baker). The Framers were keenly aware that during slavery and in its aftermath Southern states suppressed a host of basic freedoms. *Id.* at 2542 (Rep. Bingham) ("many instances of State injustice and oppression have already occurred in the State legislation of this Union"). Before the Civil War, "[t]he structural imperatives of the peculiar institution led slave states to violate virtually every right and freedom declared in the Bill [of Rights] . . . . Slavery bred repression." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 160 (1998). After the war, to retain their grip over the former slaves, governments across the South enacted Black Codes designed to coerce the freedmen back into the plantation labor system and prevent them from exercising the freedoms enjoyed by whites.

The Black Codes established a range of new crimes that were enforced through the infliction of "severe penalties," Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull), including fines, forfeiture of property, corporal punishment, imprisonment, and forced labor, all "in punishment of crimes of the slightest magnitude," *id.* at 1123 (Rep. Cook). Members of Congress lambasted these measures, highlighting among other things the outlandish fines imposed by the Black Codes. *See id.* at 516-17, 651, 1621, 3210. Lawmakers also decried the widespread denial of property rights to the former slaves. *See id.* at 94, 475, 589. Such measures were seen as abridgements of fundamental rights, and the Fourteenth Amendment was adopted in part to "restrain the power of the States and compel them at all times to respect these great

fundamental guarantees." *Id.* at 2766 (Sen. Howard).

As history shows, the Fourteenth Amendment was meant to effect a radical constitutional transformation, imposing on the states an obligation to respect the individual liberties enumerated in the Bill of Rights. "[T]he chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States," *McDonald*, 561 U.S. at 762, and their "well-circulated speeches" informed the ratifying states and the public at large that the Amendment was meant to "enforce constitutionally declared rights against the States," *id.* at 833 (Thomas, J., concurring).

In this case, however, the Indiana Supreme Court renounced that promise and abdicated its responsibility to faithfully interpret and apply the Fourteenth Amendment. Although this Court has developed "well established" standards for identifying which protections in the Bill of Rights the Fourteenth Amendment makes applicable to the states, *McDonald*, 561 U.S. at 750, the Indiana Supreme Court refused to apply those standards or to engage in "the sort of Fourteenth Amendment inquiry required by [this Court's] cases," *id.* at 758 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 620 n.23 (2008)). Instead, the court simply announced that it would "elect not to impose" on Indiana the obligations of the Excessive Fines Clause. Pet. App. 9. As shown below, that result cannot be squared with the text and history of the Fourteenth Amendment or with this Court's precedents.

ARGUMENT

I. The Fourteenth Amendment Was a Response to Rampant Infringement of Fundamental Liberties by the States, Including Deprivations of Property Rights and the Oppressive Use of Fines

After the Civil War, "[t]he overriding task confronting Congress and the new President was to restore the states that had attempted to secede to their proper place in the Union." David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 383 (2008). Complicating this task, the states of the ex-Confederacy remained defiant in their suppression of former slaves and their persecution of those who had opposed secession. "Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to determine whether, and on what conditions, those States should be readmitted to the Union." *McDonald*, 561 U.S. at 827 (Thomas, J., concurring). Composed of members of the House and Senate, the Committee was given both fact-finding powers and legislative jurisdiction: it took testimony and controlled the framing of constitutional amendments and legislation concerning Reconstruction.

Based on its exhaustive investigation into conditions in the South, the Joint Committee submitted to Congress a report that "extensively catalogue[d] the abuses of civil rights in the former slave States." *Id.* The report confirmed the systematic violation of fundamental rights by Southern states, demanding "changes of the organic law" to secure the "civil rights and privileges of all citizens in all parts of the republic." *Report of the Joint Committee on Reconstruction*, *supra*, at xxi.

Of central concern to the Joint Committee and other members of Congress were the Black Codes. Enacted in jurisdictions across the South after the war, these legislative measures represented an attempt to re-institutionalize slavery in a different guise—systematically violating the rights of the newly freed slaves to force them into conditions replicating the pre-war plantation system. Under "the barbarous codes which have been passed in all the rebel States," said one lawmaker, freedmen were in "a condition of nominal freedom worse than a condition of actual slavery." Cong. Globe, 39th Cong., 1st Sess. 1839 (1866) (Rep. Clarke); *see Report of the Joint Committee on Reconstruction*, *supra*, Pt. II at 218 (testimony of Gen. Rufus Saxton) ("it will be the purpose of their former masters to reduce them as near to a condition of slaves as it will be possible to do . . . they would deprive them by severe legislation of most of the rights of freedmen"); *id.* Pt. II at 4 (testimony of Brevet Maj. Gen. John W. Turner) (discussing Southern refusal "to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property"). As one observer put it, "the South is determined to have slavery—the thing, if not the name." Cong. Globe, 39th Cong., 1st Sess. 94 (1865) (Sen. Sumner) (quoting report sent to Congress); *see id.* at 3210 (1866) (Rep. Julian) ("Cunning legislative devices are being invented in most of the States to restore slavery in fact.").

Beginning in 1865, for instance, many localities "adopted ordinances limiting black freedom of movement, prescribing severe penalties for vagrancy, and restricting blacks' right to rent or purchase real estate and engage in skilled urban jobs." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 198 (1988); *see id.* at 200 ("Virtually all the

former Confederate states enacted sweeping vagrancy and labor contract laws," which required freedmen to be contractually employed under terms supervised by the state.); Cong. Globe, 39th Cong., 1st Sess. 588 (1866) (Rep. Donnelly) ("The adult negro is compelled to enter into contract with a master, and the district judge, not the laborer, is to fix the value of the labor.").

The "centerpiece" of these Codes "was the attempt to stabilize the black work force and limit its economic options apart from plantation labor. Henceforth, the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers." Foner, *supra*, at 199; *see Report of the Joint Committee on Reconstruction*, *supra*, Pt. II at 240 (statement of Captain Alexander P. Ketchum) ("The planters are disposed . . . to insert in their contracts tyrannical provisions, to prevent the negroes from leaving the plantation . . . ."); Cong. Globe, 39th Cong., 1st Sess. 1839 (1866) (Rep. Clarke) (citing "lately passed laws calculated to virtually make serfs of the persons that the [thirteenth] amendment made free").

The Black Codes also denied property rights to the ex-slave. "It seemed everywhere determined upon that he should not be an owner of land." *Report of the Joint Committee on Reconstruction*, *supra*, Pt. II at 243 (statement of Freedmen's Bureau officer J.W. Alvord); *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 588 (1866) (Rep. Donnelly) ("The black code of Mississippi provides that no negro shall own or hire lands in the State . . . ."). Personal property was seized from blacks by bands of whites who acted with tacit or overt government approval. *See id.* at 94 (1865) (Sen. Sumner) (quoting report describing "the militia robbing the colored people of their property" and their weapons); *id.*

(quoting report describing the torture of blacks as a "means of extorting from the freed people a confession as to where they have their arms and money concealed"). "We need protection for our person and property," implored the freedmen of Tappannock, Virginia, in a letter sent to the House of Representatives in December 1865. *Id.* at 516 (1866).

Blacks who failed to comply with these mandatory contractual obligations violated the *criminal* law, and such infractions, like other violations of the Black Codes, were punished with harsh penalties that included fines, imprisonment, lashings, forced labor, and forfeiture of private property. "If employers could no longer subject blacks to corporal punishment, courts could mandate whipping as a punishment for vagrancy or petty theft. If individual whites could no longer hold blacks in involuntary servitude, courts could sentence freedmen to long prison terms, force them to labor without compensation on public works, or bind them out to white employers who would pay their fines." Foner, *supra*, at 205; Cong. Globe, 39th Cong., 1st Sess. 588 (1866) (Rep. Donnelly) ("If he thinks the compensation too small and will not work, he is a vagrant, and can be hired out for a term of service at a rate . . . to be fixed by the judge."); *id.* at 474 (Sen. Trumbull) ("They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery."); *id.* at 1123 (Rep. Cook) (citing "laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude").

A Louisiana ordinance read to the House of Representatives was typical. Among other things, it specified that a freedman who entered town limits without special permission would be punished by

"imprisonment and two days' work on the public streets, or shall pay a fine of $2.50." *Id.* at 516 (Rep. Eliot). Blacks found on the streets after 10 p.m. without a special pass were to be "imprisoned and compelled to work five days on the public streets, or pay a fine of five dollars," and if found on the streets after 3 p.m. on a Sunday, "imprisoned and made to work two days on the public streets, or pay two dollars." *Id.* at 516-17. Preaching without a license was punished by "a fine of ten dollars or twenty days' work on the public streets"; a person not in military service carrying a firearm without special permission would "forfeit his weapons, and shall be imprisoned and made to work five days on the public streets, or pay a fine of five dollars"; and engaging in commercial exchanges of merchandise without special permission resulted in "the penalty of the forfeiture of said articles, and imprisonment and one day's labor, or a fine of one dollar." *Id.* at 517. Anyone who rented a house to blacks would "pay a fine of ten dollars for each offense." *Id.*

Similar measures swept the South. *See, e.g.*, *id.* at 1621 (Rep. Myers) ("a vagrant in [Florida] shall be punished by a fine not exceeding $500 and imprisoned for a term not exceeding twelve months, or by being sold for a term not exceeding twelve months, at the discretion of the court"); *id.* (Rep. Myers) (Alabama's laws, "among other harsh inflictions[,] impose an imprisonment of three months and a fine of $100 upon any one owning fire-arms, and a fine of fifty dollars and six months' imprisonment on any servant or laborer (white or black) who loiters away his time or is stubborn or refractory"); *id.* at 651 (Rep. Grinnell) (reporting that "[a] white man in Kentucky may keep a gun," but "if a black man buys a gun he forfeits it and pays a fine of five dollars"); *id.* at 2777 (Rep. Eliot) (reporting that even in the Union state of Maryland, "if a

white man employ a colored clerk, the penalty is fifty dollars," that "[f]or a negro to belong to any secret society is a felony—the punishment a fine of fifty dollars," and that "'free negroes' that leave the counties and return shall be punished by fine and imprisonment" (quoting Freedmen's Bureau report)).

Formal distinctions between whites and blacks concerning fines and other punishments were supplemented by discriminatory application of the written law. A letter was read in the Senate, for instance, reporting that "in nine cases out of ten . . . where a white man has provoked an affray with a black, and savagely misused him, the black man has been fined for insolent language because he did not receive the chastisement in submissive silence, while the white man has gone free." *Id.* at 94 (1865) (Sen. Sumner).

As these examples illustrate, fines were used interchangeably and in combination with imprisonment and physical punishment to enforce the regime of the Black Codes. *See id.* at 3210 (1866) (Rep. Julian) (in South Carolina "a black man convicted of an offense who fails immediately to pay his fine is whipped"). Indeed, the infliction of excessive and unpayable fines supplied the pretext under which slavery conditions were reinstituted, as freedmen were sold into forced labor to repay those fines.

Mississippi's vagrancy law, for instance, decreed that "freedmen, free negroes and mulattoes" found "without lawful employment or business, or found unlawfully assembling themselves together," were to be fined up to fifty dollars. An Act to Amend the Vagrant Laws of the State § 2 (Nov. 24, 1865), *reprinted in* S. Exec. Doc. No. 39-6, at 192 (1867). The law further provided that "all fines and forfeitures collected under the provisions of this act shall be paid into the county treasury for general county purposes," and that, if

anyone "shall fail for five days after the imposition of any fine or forfeiture . . . to pay the same," it became "the duty of the sheriff of the proper county to hire out said freedman, free negro or mulatto, to any person who will, for the shortest period of service, pay said fine or forfeiture." *Id.* § 5.

The state's reliance on outlandish fines as a tool of repression was far from unusual. Most of the Black Codes "shared key common features. Freed slaves were required to maintain employment . . . to avoid arrest for vagrancy. Black 'vagrants' were to be auctioned off as contract laborers to white employers who paid their fines." Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 Law & Contemp. Probs. 175, 204 (2004). Thus, when the Commissioner of the Freedmen's Bureau compiled for the Senate a synopsis of laws concerning people of color, he called "special attention" to the South's vagrancy laws, emphasizing that "[t]he small time allowed after the expiration of one contract before a person must enter another to escape vagrancy will occasion practical slavery." He continued:

> The arrest of unemployed persons as vagrants upon information given by any party; his trial by a justice of the peace; the sale of his services at public outcry for payment of the fine and costs, without limit as to time, and whipping and working in chain-gangs, present some of the obnoxious features of these singular laws.

Letter from Maj. Gen. O.O. Howard to Sec'y of War E.M. Stanton (Dec. 21, 1866), *reprinted in* S. Exec. Doc. No. 39-6, at 2-3 (1867). Indeed, the Commissioner had received detailed evidence of such abuses, like the following report from Nashville, Tennessee:

> About three weeks since the police of this city arrested some forty or fifty young men and boys (colored) on various pretexts, mostly for vagrancy, and they were thrown into the workhouse to work out fines of from $10 to $60 each. By an arrangement with the city recorder . . . [two] residents of this city . . . by paying their fines, induced the prisoners, as is claimed, to consent to go to Arkansas to work on a plantation. The freedmen were taken from the workhouse and carried off under guard. Many of them are minors, and were taken away without the knowledge or consent of their parents.

Report from Brevet Brigadier Gen. J.R. Lewis, Assistant Comm'r, to Maj. Gen. O.O. Howard (Nov. 1, 1866), *reprinted in* S. Exec. Doc. No. 39-6, at 129 (1867).

Accounts of these oppressive measures reached Congress in steady reports from the South: "Every mail brings to us the records of injustice and outrage." Cong. Globe, 39th Cong., 1st Sess. 1838 (1866) (Rep. Clarke). Lawmakers viewed such practices as violating core freedoms identified in the Bill of Rights, *see id.* at 1617 (Rep. Moulton) (decrying the lack of "protection to life, liberty, or property"), and condemned these laws as abridgements of fundamental liberties. "A law that does not allow a colored person to hold property . . . is certainly a law in violation of the rights of a freeman." *Id.* at 475 (Sen. Trumbull).

Congress first responded through legislation, enacting the Civil Rights Act of 1866 and later an expansion of the Freedmen's Bureau—both of which sought to safeguard property rights. *See* Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 ("citizens, of every race and color . . . shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and

proceedings for the security of person and property, as is enjoyed by white citizens"); Act of July 16, 18[illegible] ch. 200, § 14, 14 Stat. 173, 176-77 ("the right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, . . . shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery").

Proponents of these bills explicitly linked the freedoms denied to blacks in the South with the fundamental guarantees enshrined in America's founding documents. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 632 (1866) (Rep. Moulton) ("[T]he civil rights referred to in the bill are . . . the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of Independence, the right to personal liberty, the right to hold and enjoy property, to transmit property, and to make contracts."); *id.* at 475 (Sen. Trumbull) (describing "[t]he great fundamental rights set forth in this bill" as including "the right to acquire property . . . to make contracts, and to inherit and dispose of property"); *id.* at 1839 (Rep. Clarke) ("Give, then, to the freedman his inalienable rights and that full protection due to him from a nation he has fought to defend in the hour of danger.").

Congress's statutory responses to the Black Codes also took aim at excessive and discriminatory penalties. *See* Act of July 16, 1866, 14 Stat. at 177 ("no penalty or punishment for any violation of law shall be imposed or permitted because of race or color, or previous condition of slavery, other or greater than the penalty or punishment to which white persons may be liable

by law for the like offence"); Act of Apr. 9, 1866, 14 Stat. at 27 ("citizens, of every race and color . . . shall have the same right . . . to full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding"); *id.* (making it a crime to subject "any inhabitant of any State or Territory . . . to different punishments, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude . . . or by reason of his color or race, than is prescribed for the punishment of white persons").

Ultimately, however, Congress "deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks." *McDonald*, 561 U.S. at 775. As one Senator explained, the newly freed slaves needed to be guaranteed "the essential safeguards of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 1183 (1866) (Sen. Pomeroy).

II. The Fourteenth Amendment Transformed the Nation's Federal System To Prevent States from Violating the Freedoms Set Forth in the Bill of Rights

In order "to provide a constitutional basis" for the protection of fundamental rights in the South, *McDonald*, 561 U.S. at 775, the American people transformed our federal system by adopting the Fourteenth Amendment. The debates in Congress over the Amendment confirm that its first section was understood—and described to the ratifying public—as securing against state encroachment the fundamental

liberties enumerated in the Constitution and the Bill of Rights.

In the House and Senate, "the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States," *id.* at 762, overturning *Barron v. Baltimore*, 32 U.S. 243 (1833), which held that only the federal government was bound by the Bill of Rights. *See Adamson v. California*, 332 U.S. 46, 72 (1947) (Black, J., dissenting) ("With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.").

Section One of the Fourteenth Amendment was the brainchild of Ohio congressman John Bingham, who served on the Joint Committee on Reconstruction. Introducing his draft of the Amendment in February 1866, "Bingham began by discussing *Barron* and its holding that the Bill of Rights did not apply to the States. He then argued that a constitutional amendment was necessary to provide 'an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person.'" *McDonald*, 561 U.S. at 829 (Thomas, J., concurring) (quoting Cong. Globe, 39th Cong., 1st Sess. 1089-90 (1866)). "Bingham emphasized that § 1 was designed 'to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today.'" *Id.* (quoting Cong. Globe, 39th Cong., 1st Sess. 1088 (1866)).

This speech was "broadly distributed" in pamphlet

form, bearing the subtitle "In Support of the Proposed Amendment to Enforce the Bill of Rights," and the speech received widespread newspaper coverage as well. *Id.* at 829-30 (Thomas, J., concurring).

The next month, Bingham "delivered a second well-publicized speech, again arguing that a constitutional amendment was required to give Congress the power to enforce the Bill of Rights against the States." *Id.* at 831 (Thomas, J., concurring). This speech was also "extensively published." Cong. Globe, 39th Cong., 1st Sess. 1837 (1866) (Rep. Lawrence).

In April, the Joint Committee unveiled a revised draft of the Amendment, which contained in its present form the sweeping guarantee of fundamental rights and liberties set forth in the Amendment's first section:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1; *see* Cong. Globe, 39th Cong., 1st Sess. 2764 (1866). "Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that the Amendment protected all of 'the personal rights guarantied and secured by the first eight amendments of the Constitution.'" *McDonald*, 561 U.S. at 762 n.9 (quoting Cong. Globe, 39th Cong., 1st Sess. 2765 (1866)). "Howard explained that the Constitution recognized 'a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, . . .

some by the first eight amendments of the Constitution,' and that 'there is no power given in the Constitution to enforce and to carry out any of these guarantees' against the States." *Id.* at 831-32 (Thomas, J., concurring) (quoting Cong. Globe, 39th Cong., 1st Sess. 2765 (1866)). "Howard then stated that 'the great object' of § 1 was to 'restrain the power of the States and compel them at all times to respect these great fundamental guarantees.'" *Id.* at 832 (Thomas, J., concurring) (quoting Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)). "News of Howard's speech was carried in major newspapers across the country . . . ." *Id.*

"Finally, Representative Thaddeus Stevens, the political leader of the House and acting chairman of the Joint Committee on Reconstruction," also made explicit the import of the Amendment, stating "during the debates on the Amendment that 'the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States.'" *Id.* at 762 n.9 (quoting Cong. Globe, 39th Cong., 1st Sess. 2459 (1866)).

"As a whole, these well-circulated speeches indicate that § 1 was understood to enforce constitutionally declared rights against the States . . . ." *Id.* at 833 (Thomas, J., concurring). "[N]ot a single person in either house spoke up to deny these men's interpretation of section I." Amar, *supra*, at 187; *see* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 934 (1986) ("The amendment's author, House and Senate floor leaders, and a number of proponents and opponents expressed the belief that it secured Bill of Rights guarantees. Not one senator or congressman denied that the amendment's framers and supporters intended to secure the Bill of Rights, or expressed an

intention to exclude Bill of Rights guarantees from the rights Congress sought to secure.").

The Amendment's fate was not settled by Congress, of course, but by the states, where it was sent for ratification after both Houses approved it in June 1866. Ratification of the Fourteenth Amendment was the key political issue of the day. In the congressional elections of 1866, the Amendment was the main plank of the Republican platform, while "opposition to the Amendment [was] the focus of the Democratic platform." Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 Geo. L.J. 1275, 1279 (2013); *id.* (President Johnson's "sustained attempt to defeat the Amendment . . . helped shape public understanding of the proposed text and its impact on the autonomy of the states"). "More than anything else, the election became a referendum on the Fourteenth Amendment. Seldom, declared the *New York Times*, had a political contest been conducted 'with so exclusive reference to a single issue.'" Foner, *supra*, at 267 (quoting *N.Y. Times*, Oct. 11, 1866).

The 1866 elections resulted in a landslide victory for the Fourteenth Amendment's supporters in the Republican Party. *Id.* These decisive results turned the tide in favor of ratification, which was finally achieved in July 1868. During the intervening months, the Amendment's proponents "continued to stress the need to protect the enumerated constitutional rights of American citizens against abridgment by the states," Lash, *supra*, at 1325, and that "'[t]his protection must be coextensive with the whole Bill of Rights,'" *id.* (quoting *N.Y. Times*, Nov. 15, 1866). As more and more states voted on ratification, "the idea that the amendment would bind the states to enforce personal liberties enumerated in the Bill of Rights was no

longer (if it ever was) a disputed proposition. No one argued the point. The debate involved *whether* this was a good idea." *Id.* at 1326; *see* Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 147 (1986) (explaining that the records of the ratifying legislatures, though sparse, are "fully consistent with an intent to apply the Bill of Rights to the states").

After the Fourteenth Amendment's ratification, even Southern opponents of civil rights recognized that the Amendment prohibited the states from violating the Excessive Fines Clause and other constitutional protections. Representative Roger Mills of Texas, while arguing that any legislation promoting equality in public accommodations would be unconstitutional, said it was "clear" that "the privileges and immunities mentioned in the fourteenth amendment" included the rights enumerated in the Constitution and the Bill of Rights: "These privileges are, among others . . . immunity from excessive bail, excessive fines, and cruel and unusual punishments, and many others, all of which are recognized and guaranteed in the Constitution." 2 Cong. Rec. 384-85 (1874).

Senator Thomas Norwood of Georgia similarly described "the privileges and immunities of a citizen of the *United States*" as including "immunity . . . . from excessive fines," along with the other protections listed in the Bill of Rights. *Id.* app. 241. Before the adoption of the Fourteenth Amendment, Senator Norwood explained,

> any State might have established a particular religion, or restricted freedom of speech and of the press, or the right to bear arms, compelled a prisoner to testify against himself, imposed excessive fines and bail, inflicted unusual and cruel punishment, and so on. A State could

> have deprived its citizens of any of the privileges and immunities contained in those eight articles, but the *Federal Government* could not. . . . The people of the United States thereby laid upon the States the same inhibition which they laid seventy years ago on the United States. . . . And the instant the fourteenth amendment became a part of the Constitution, every State was that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution.

Id. app. 242.

In sum, "critical aspects of the Nation's history . . . underscored the need for, and wide agreement upon, federal enforcement of constitutionally enumerated rights against the States." *McDonald*, 561 U.S. at 841 (Thomas, J., concurring). To achieve that end, the Fourteenth Amendment was adopted to effect a radical constitutional transformation—one that would impose on the states an obligation to respect certain fundamental guarantees, and in particular the individual liberties enumerated in the federal Bill of Rights.

III. The Fourteenth Amendment's Text and History Require Applying the Excessive Fines Clause to the States

The Fourteenth Amendment's promise of liberty would be an empty one if states were given free rein to abrogate the safeguards set forth in the Constitution and the Bill of Rights. Yet that is what happened here. In the proceedings below, Indiana's trial and intermediate courts agreed that penalizing Tyson Timbs by forfeiting his personal vehicle was "excessive" and

"grossly disproportionate to the gravity of Timbs's offense," in violation of the Eighth Amendment's Excessive Fines Clause. Pet. App. 24. But the Indiana Supreme Court refused even to consider that argument, instead explaining that it would "elect" not to enforce the Clause against Indiana. *Id.* at 9. Declaring that "Indiana is a sovereign state within our federal system," the court asserted that it would "decline to subject Indiana to a *federal* test." *Id.*

That result is indefensible. Allowing Indiana or any other state to violate the Excessive Fines Clause is at odds with the Fourteenth Amendment's text and history and with this Court's precedents.

This Court has already "held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States." *McDonald*, 561 U.S. at 750. While the Court has not taken the position that the Fourteenth Amendment's Privileges and Immunities Clause categorically extends the entire Bill of Rights to the states, it has adopted "a process of 'selective incorporation'" under which the Amendment's Due Process Clause has been found to "fully incorporate[] particular rights contained in the first eight Amendments." *Id.* at 763; *cf.* Akhil Reed Amar, *America's Constitution: A Biography* 389 (2005) ("[S]keptics have raised important questions about the peculiar manner in which the Court eventually came to apply the Bill of Rights to the states . . . . But none of the skeptics' objections is a good argument against incorporation per se, as distinct from the particular manner in which the Court has effected and explained its doctrine.").

Under this process of "selective incorporation," a "well established" standard now governs whether a protection secured by the Bill of Rights applies to the states through the Fourteenth Amendment.

McDonald, 561 U.S. at 763, 750. That standard asks whether the right at issue "is fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition." *Id.* at 767 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), and *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (emphasis omitted). To answer those questions, this Court has looked to ancient legal codes, the 1689 English Bill of Rights, the common law and its prominent expounders such as Blackstone, the views of the American colonists in the Revolutionary era, early American state constitutions, records of the drafting and ratifying of the Constitution and Bill of Rights, and evidence surrounding the adoption of the Fourteenth Amendment. *See id.* at 767-78.

By those metrics, as Timbs has demonstrated, freedom from excessive fines is "fundamental to our scheme of ordered liberty," Pet'r Br. 8 (quoting *McDonald*, 561 U.S. at 767), a vital protection against "the potential for governmental abuse of its prosecutorial power," *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989) (quotation marks omitted). Such freedom is therefore one of the "fundamental guarantees" that it was "the great object" of the Fourteenth Amendment to secure against state encroachment. Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (Sen. Howard); *see* Pet'r Br. 8-25.

Treating freedom from excessive fines as a second-class right would be particularly inexcusable given that the Fourteenth Amendment was adopted, at least in part, in response to the Southern states' use of fines to suppress African Americans and force them to serve their former masters. *See supra*, Part I. Flouting the lessons of that history, the Indiana Supreme Court's distorted view of the Fourteenth Amendment would allow states to impose any fines they wish, no matter

how excessive and out of line with fundamental principles of justice.

This history also illustrates why it would be anomalous to require states to obey the Eighth Amendment's bans on excessive bail and on cruel and unusual punishments—*see Schilb v. Kuebel*, 404 U.S. 357, 365 (1971); *Robinson v. California*, 370 U.S. 660, 667 (1962)—while permitting those states to violate the same Amendment's ban on excessive fines. As the drafters and ratifiers of the Fourteenth Amendment were aware, oppressive fines were used in tandem with imprisonment and corporal punishment as part of an overarching effort "to restore slavery in fact" throughout the post–Civil War South. Cong. Globe, 39th Cong., 1st Sess. 3210 (1866) (Rep. Julian). And today, just as in the mid-nineteenth century, fines "can effectively control a person's life, strip them of their property, and deprive them of their freedom," while remaining "prone to abuse, with the government's impulse to raise 'royal revenue' competing with its duty to act fairly and justly." Pet'r Br. 26 (quoting *Browning-Ferris*, 492 U.S. at 271).

The Indiana Supreme Court defended its refusal "to subject Indiana to a *federal* test" by observing that doing so "may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." Pet. App. 9. To be sure, adhering to the guarantees of our national charter may limit a state's options, but that is the very point of those guarantees. As this Court has explained: "Incorporation always restricts experimentation and local variations," because "'[t]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.'" *McDonald*, 561 U.S. at 790 (quoting *Heller*, 554 U.S. at 636). While "the right of a State to regulate the conduct of its citizens is undoubtedly a very broad and

extensive one, and not to be lightly restricted," there "are certain fundamental rights which this right of regulation cannot infringe." *The Slaughter-House Cases*, 83 U.S. 36, 114 (1872) (Bradley, J., dissenting).

CONCLUSION

For the foregoing reasons, the judgment of the Indiana Supreme Court should be reversed.

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No. 17-646

IN THE

Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER, CATO INSTITUTE, AMERICAN CIVIL LIBERITES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF ALABAMA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil-rights laws. The ACLU of Alabama is a statewide affiliate of the national ACLU, with thousands of members throughout the state. Since its founding in 1920, the ACLU has appeared in numerous cases before this Court,

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

both as counsel representing parties and as *amicus curiae*.

Amici have a strong interest in ensuring that all constitutional provisions, including the Double Jeopardy Clause, are applied in a manner consistent with their text and history.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Terance Gamble was convicted in Alabama state court for being a felon in possession of a firearm and served a one-year sentence. The federal government, through the Alabama U.S. Attorney's Office, then charged Gamble with being a felon in possession of a firearm under federal law for the very same conduct giving rise to his state conviction. Pet. App. 6a.

If this successive prosecution had been carried out by one government, it plainly would have violated the Fifth Amendment's Double Jeopardy Clause, which prohibits any person from being "twice put in jeopardy of life or limb" for the "same offence." U.S. Const. amend. V. However, because the charges were filed by a State and the federal government respectively, the so-called dual-sovereignty exception to the Double Jeopardy Clause permitted Gamble to be prosecuted twice for the same offense. This result does not accord with the Double Jeopardy Clause's text or history and undermines our constitutional structure.

First, the exception is not supported by the text of the Clause, which focuses on the "person" being charged, and does not reference the sovereign(s) doing the charging. Being charged with a crime causes a person "embarrassment, expense and ordeal and compel[s] him to live in a continuing state of anxiety and

insecurity, as well as enhanc[es] the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957). These consequences are the same no matter which sovereign charges him. Moreover, the term "same offence" is a capacious one that naturally includes charges for the same crime by two different sovereigns.

Second, the history of the Double Jeopardy Clause makes clear that it prohibits successive charges by two sovereigns. The Framers adopted the Fifth Amendment to enshrine in the Constitution the English common-law defense of *autrefois acquit*, or "formerly acquitted." *See, e.g.*, *Grady v. Corbin*, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting). That English common law, in turn, permitted defendants to introduce evidence of an acquittal by a foreign court as a defense to a charge in England. *See* J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. Rev. 1, 8-9 (1956). For that reason, it is little surprise that numerous American sources in the decades following the Founding—including opinions from this Court, opinions from state supreme courts, and treatises—assumed that charges by separate sovereigns for the same offense would violate the Double Jeopardy Clause. *See, e.g.*, *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820); *State v. Antonio*, 5 S.C.L. 562, 2 Tread. 776, 781 (1816). It is only more recently that the dual-sovereignty exception has permitted such successive charges.

Finally, the dual-sovereignty exception is at odds with the purpose of the Double Jeopardy Clause and the constitutional structure more broadly. The Framers viewed the Double Jeopardy Clause as a fundamental protection of individual liberty and an important safeguard against government harassment

and overreach. *See* 3 Joseph Story, *Commentaries on the Constitution of the United States*, § 1774, at 653-54 (Boston, Hillard, Gray, and Co. 1833). The dual-sovereignty exception, by allowing two governments to do together what neither could do alone, undermines the fundamental protection of individual liberty that the Double Jeopardy Clause was adopted to achieve. When a defendant is subjected to multiple prosecutions for the same offense, the anxiety and humiliation are the same, regardless of who brings the successive prosecutions. Worse yet, the prospect that an innocent person might be wrongly convicted also increases with multiple prosecutions, regardless of who brings them.

Reconsideration of the dual-sovereignty exception is particularly appropriate today given two significant legal developments that have occurred since this Court last meaningfully considered the issue in 1959. *See generally United States v. Gaudin*, 515 U.S. 506, 521 (1995) (reasons for *stare decisis* undermined when the "underpinnings" of the "decision in question" have been "eroded[] by subsequent decisions of this Court").

First, when this Court adopted the dual-sovereignty exception, the Double Jeopardy Clause's prohibition on successive prosecutions did not apply to the States. *See, e.g.*, *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959). Whatever validity the doctrine may have had in that context, it has been undermined by subsequent decisions by this Court recognizing that the Fourteenth Amendment protects against state infringement of the Double Jeopardy Clause. *See Benton v. Maryland*, 395 U.S. 784 (1969). Just as incorporation led to the demise of other "dual sovereign" doctrines, so should it here. Where both state and federal officials are barred from bringing successive prosecutions for the same

offense, it makes little sense to allow them to do together what neither could do on their own.

Second, concerns about government overreach and harassment are particularly acute today because the scope of federal criminal law is far more expansive than it was when the dual-sovereignty exception was last considered, *see, e.g.*, *Evans v. United States*, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting) (noting that "the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws"), and federal law often overlaps with state law even as to localized conduct, Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997). There is now also significant federal-state cooperation in criminal law enforcement. *See, e.g.*, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev. 1, 31-32 (2011); Meese, *supra*, at 3. These two factors, taken together, make it particularly easy for the federal and state governments to engage in the repeated harassment for a single offense that the Double Jeopardy Clause was adopted to prevent.

For all these reasons, this Court should overrule the dual-sovereignty exception to the Double Jeopardy Clause and restore the proper scope of this important protection of individual liberty.

ARGUMENT

I. THE DUAL-SOVEREIGNTY EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE IS AT ODDS WITH THE TEXT, HISTORY, AND STRUCTURE OF THE CONSTITUTION.

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall be . . . subject for

the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The text, history, and structure of the Constitution make clear that the Double Jeopardy Clause prohibits the federal and state governments from successively charging the same defendant for the same crime.

1. First, the text of the Double Jeopardy Clause, which provides that "[n]o *person* shall be . . . subject for the same offence to be twice put in jeopardy of life or limb," *id.* (emphasis added), is inconsistent with the idea that different sovereigns may charge an individual for the same crime. After all, the Clause's text focuses on the "person" being put in jeopardy, and does not even mention the sovereign or sovereigns putting the person in jeopardy. And that is for good reason: the Clause was adopted to prevent the "embarrassment, expense and ordeal" and the "continuing state of anxiety and insecurity" that would result if individuals could be charged with the same criminal offense more than once. *Green*, 355 U.S. at 187; *see Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) ("The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct.").

From the perspective of the person charged, the jeopardy of life or limb that a criminal charge causes—and the concomitant "embarrassment," "anxiety," and "insecurity"—are the same no matter which sovereign causes it. As Justice Black reasoned, "[i]f danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, then when one of these 'Sovereigns' proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct." *Bartkus*, 359 U.S. at 155 (Black, J., dissenting). Put differently, a defendant

"probably d[oes] not feel better off being doubly prosecuted by different governments rather than by the same one." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy After Rodney King*, 95 Colum. L. Rev. 1, 9 (1995).

In the past, some have looked to the term "same offence" to justify the dual-sovereignty exception, suggesting that a violation of the laws of two different sovereigns can never be the same offense. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 88 (1985) ("When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922))); *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852) (if a person commits an act that violates the laws of two sovereigns, "he has committed two offences, for each of which he is justly punishable").

But the term "offence" at the time of the Founding was defined broadly as "[a]ny transgression of law, divine or human; a crime; sin; act of wickedness or omission of duty." 2 *Webster's Dictionary* 203 (1st ed. 1828). Thus, the term "same offence" can apply to the "law[s]" or "crime[s]" of two different sovereigns, just as it can apply to two different crimes of the same sovereign. *Cf. Grady v. Corbin*, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting) (rejecting the idea that "two criminal provisions create 'distinct' offenses simply by appearing under separate statutory headings"). It is thus this Court's long-standing test from *Blockburger v. United States*, 284 U.S. 299 (1932), which looks to whether the elements of two laws each "require[] proof of a different element," *id.* at 304, that should determine whether laws constitute the same "offence," not whether the laws are enforced by different sovereigns. In short, the

text of the Double Jeopardy Clause provides no support for a dual-sovereignty exception to its protections.

2. In addition to the text, the history of the Double Jeopardy Clause makes clear that the Framers adopted the Clause to ensure that an acquittal or conviction in one jurisdiction could be pled as a defense in another jurisdiction.

At the time of the Founding, English common law allowed a defendant acquitted in a foreign court to raise the defense of *autrefois acquit*, or "formerly acquitted," and *autrefois convict*, or "formerly convicted," to subsequent criminal charges in another jurisdiction. *See* Grant, *supra*, at 8-9. For example, in the leading case of *Rex v. Hutchinson*, the judges apparently concluded that Hutchinson's acquittal of a murder charge in a Portuguese court served as a defense in England for the same crime. *Id.* at 9.[2] Similarly, in *The King v. Captain Roche*, Captain Roche pleaded *autrefois acquit* to a murder charge based on an acquittal before a Dutch court, and the court held that the acquittal barred the charge. As the judges noted: if the court held "for the prisoner" on the *autrefois acquit* issue, the jury "could not go to the [issue of guilt] because that finding [of *autrefois acquit*] would be a bar." *The King v. Captain Roche*, 1 Leach 134, 135, 168 Eng. Rep. 169 (1775).

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[2] This Court has previously questioned whether it is appropriate to rely on *Rex v. Hutchinson* given that the case was never reported itself, but instead only discussed in other cases. *See, e.g.*, *Bartkus*, 359 U.S. at 128 n.9 (questioning the "confused and inadequate reporting" of the case). But what is important is what the Framers of the Fifth Amendment would have understood it to mean, and at the time of the Founding numerous other courts and treatises treated *Hutchinson* as a case that stood for the proposition that an acquittal in one court served as a defense in another court.

Based on these precedents, Founding-era treatises made clear that an acquittal in any court could serve as a bar to further prosecution in any other court. For instance, Hawkins' 1762 *Pleas of the Crown* explained that "if a Man steal Goods in one county, and then carry them into another, in which case it is certain . . . that he may be indicted and found guilty in either, it seems very reasonable, that an acquittal in the one County for such stealing may . . . be pleaded in bar of a subsequent prosecution for the same stealing in another county" because otherwise "his life would be twice in danger from that which is in truth but one and the same offence." 2 William Hawkins, *A Treatise of the Pleas of the Crown*, ch. 35, § 4, at 526 (Thomas Leach ed., 6th ed. 1787). Hawkins later reiterated that "an acquittal of murder at a grand sessions in Wales, may be pleaded to an indictment for the same murder in England. [F]or the . . . rule is, [t]hat a man's life shall not be brought into danger for the same offence more than once." *Id.* § 10, at 529. At no point in his treatise did Hawkins attempt to determine whether two counties, or England and Wales, were separate sovereigns for purposes of the *autrefois acquit* or *autrefois convict* defenses, as modern dual-sovereignty doctrine requires.

Similarly, MacNally's *Rules of Evidence on Pleas of the Crown*, published in England and the United States just after the Founding, explained that "[the] final sentence, decree, or judgment of any foreign court which hath competent jurisdiction of the subject determined before them, is conclusive evidence *in any other court of concurrent jurisdiction*; and therefore an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England." 2 Leonard MacNally, *Rules of Evidence on Pleas of the Crown* 427-28 (1802); *see Green*, 355

U.S. at 200 (Frankfurter, J., dissenting) (quoting Blackstone's Commentaries as stating that "when a man is once fairly found not guilty upon any indictment, or other prosecution, *before any court having competent jurisdiction of the offence*, he may plead such acquittal in bar of any subsequent accusation for the same crime" (emphasis added)); Grant, *supra*, at 10 n.36 (collecting other treatises).

Members of the First Congress suggested that the Double Jeopardy Clause was intended to mirror this common law rule. *See, e.g.*, 1 Annals of Cong. 782 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Livermore) (noting that it "is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence" and that the Clause "was declaratory of the law as it now stood"). Moreover, American treatises confirmed that the Double Jeopardy Clause imported English common law principles. *See, e.g.*, 3 Story, *supra*, § 1781, at 659 (the Double Jeopardy Clause "is another great privilege secured by the common law"); 1 Francis Wharton, *A Treatise on the Criminal Law of the United States* 467 (7th rev. ed. 1874) (the Double Jeopardy Clause "is nothing more than a solemn asservation of the common law maxim"); *see also Grady*, 495 U.S. at 530 (Scalia, J., dissenting) ("The Clause was based on the English common-law pleas of *autrefoits acquit* and *autrefoits convict* . . . ."); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 170 (1873) (The Clause "prevent[s] a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.").[3]

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[3] Notably, although Madison's initial proposal provided that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence," 1

Because of this, it is little surprise that early American courts repeatedly referenced the rule that acquittals from out-of-jurisdiction courts could act as defenses against criminal charges. Indeed, in an early opinion, this Court explained that "[r]obbery on the seas is considered as an offence within the criminal jurisdiction of all nations . . . and there can be no doubt that the plea of *autrefois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State." *Furlong*, 18 U.S. at 197. Similarly, a South Carolina court around the same time stated that "[i]f [double jeopardy protections] prevail[] among nations who are strangers to each other, could it fail to be exercised with us [states] who are so intimately bound by political ties?" *Antonio*, 2 Tread. at 781. The Michigan Supreme Court opined that if the state and federal criminal code had "concurrent jurisdiction" over certain acts, a state "conviction would be admitted in federal courts as a bar." *Harlan v. People*, 1 Doug. 207, 212 (Mich. 1843). And the Supreme Judicial Court of Massachusetts held that where a State and the federal government have concurrent jurisdiction over certain criminal acts, "the delinquent cannot be tried and punished twice for the same offence" and "the court which *first* exercises jurisdiction has the right to enforce it by trial and judgment." *Commonwealth v. Fuller*, 49 Mass. (8 Met.) 313, 317-18 (1844) (emphasis added).

Annals of Cong. 451-52 (1789) (Joseph Gales ed., 1834), this proposal was amended in the Senate, and in its final form, the Double Jeopardy Clause used "the more traditional language employing the familiar concept of 'jeopardy,'" "language that tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*," *United States v. Wilson*, 420 U.S. 332, 341-42 (1975).

In fact, as recently as 1909, this Court observed that "[w]here an act is . . . prohibited and punishable by the laws of [two] states, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both states, so that one convicted or acquitted in the courts of the one state cannot be prosecuted for the same offense in the courts of the other." *Nielsen v. Oregon*, 212 U.S. 315, 320 (1909).[4] Indeed, before this Court's first decision approving of the dual-sovereignty exception in *United States v. Lanza*, 260 U.S. 377 (1922), "the cases of actual double punishment found [were] so few, in relation to the great mass of criminal cases decided, that one can readily discern an instinctive unwillingness to impose such hardships on defendants," *Bartkus*, 359 U.S. at 160 (Black, J., dissenting). It is only more recently that this Court has adopted a dual-sovereignty exception that deviates from the common-law doctrine that existed in England and America before and after the Founding. That doctrine clearly prohibited second prosecutions for the same offense no matter which sovereign charged a person.[5]

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[4] In *Heath v. Alabama*, this Court sought to "limit[]" *Nielsen* "to its unusual facts" of "questions of jurisdiction between two entities deriving their concurrent jurisdiction from a single source of authority." 474 U.S. at 91. However, nothing in *Nielsen*'s language suggests any such limitation. It is difficult to understand why the principle of prohibiting two states from charging a person for the same offense should apply any more to a situation where two states have concurrent jurisdiction over conduct in the same river—as in *Nielsen*—than to a situation where two states have concurrent jurisdiction over a kidnapping and murder that took place across state lines—as in *Heath*.

[5] Although many of these early precedents from England and America concern foreign-nation double jeopardy protections, there is no reason to limit the doctrine to that type of dual sovereignty. Sources from the Framing do not explain the doctrine in

3. In addition to having no basis in the Constitution's text and history, the dual-sovereignty exception also undermines the Clause's purposes, and the constitutional structure more broadly.

First, the dual-sovereignty exception is inconsistent with the purpose of the Double Jeopardy Clause, which, as noted above, was to ensure that individuals were not tried twice for the same offense. As Representative Samuel Livermore noted, "[m]any persons may be brought to trial . . . but for want of evidence may be acquitted," and "in such cases, it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." 1 Annals of Cong. 782 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Livermore); *see id.* (remarks of Rep. Roger Sherman) (observing that "the courts of justice would never think of trying and punishing twice for the same offence").

To the Framers, this prohibition on double jeopardy was essential to protecting a person's liberty from government overreach. *See* 3 Story, *supra*, § 1774, at

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terms of international relations, but in terms of the individual right of *autrefois acquit*. Moreover, if the Founders believed domestic courts should respect the acquittals or convictions of foreign courts, there is little reason why they would have thought they should accord any less respect to the findings of other domestic courts.

If anything, the argument for extending double jeopardy principles to separate sovereigns is *stronger* in the federal-state context than in the foreign-domestic sovereign context. That is because, as noted below, once the Double Jeopardy Clause was incorporated via the Fourteenth Amendment and applied to the states, the same prohibition applied to both federal and state officials. Where the same constitutional principle prohibits state and federal officials from successive prosecutions when they act independently, those same officials should not be allowed to avoid that prohibition by acting together.

653 (the Clause provided "a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy"); *Green*, 355 U.S. at 187-88; Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 96 (1998) (Double Jeopardy Clause "safeguard[s] . . . the individual defendant's interest in avoiding vexation," whether he was first acquitted or convicted).

When a defendant is subjected to multiple prosecutions for the same offense, however, the "embarrassment, expense and ordeal," *Green*, 355 U.S. at 187, are the same regardless of who brings the successive prosecutions. The prospect that an innocent person might be wrongly convicted also increases with multiple prosecutions, regardless of who brought them. The dual-sovereignty exception carves a hole in this fundamental protection of liberty, requiring defendants who have been convicted or acquitted to "'run the gauntlet' a second time," *Abney v. United States*, 431 U.S. 651, 662 (1977).

More broadly, the dual-sovereignty exception also undermines the right to a jury trial enshrined in the Sixth Amendment. The jury trial right and the prohibition against double jeopardy go hand in hand. "[T]he Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009). The Clause therefore "safeguard[s] not simply the individual defendant's interest in avoiding vexation but also the

integrity of the initial petit jury's judgment." Amar, *supra*, at 96.[6]

The dual-sovereignty exception undermines the role of the jury. Under the dual-sovereignty exception, a defendant with both state and federal charges arising from the same conduct could be acquitted by a state jury, then subsequently convicted by a federal jury—or vice versa. This possibility erodes the historic respect accorded to a jury's verdict. *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 130 (1978).

Finally, some have defended the dual-sovereignty exception on federalism grounds, arguing that state and federal governments should be permitted to carry out law enforcement independently. But this view turns federalism principles on their head. The division of powers between state and federal governments was premised on the notion "that 'freedom is *enhanced* by the creation of two governments, not one.'" *Bond v. United States*, 564 U.S. 211, 220-21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)) (emphasis added). As Madison explained, federalism provides "a double security . . . to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, at 323 (James Madison) (Clinton Rossiter ed., 1961). Instead of protecting liberty, however, the dual-sovereignty exception permits the two levels of government to do together what neither could

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[6] Indeed, the "protection against double jeopardy historically applied only to charges on which a jury had rendered a verdict." *Smith v. Massachusetts*, 543 U.S. 462, 466 (2005). Thus, for example, in an early case, an English court banned trial judges from attempting to eliminate double jeopardy protections by discharging juries when they were poised to deliver an acquittal. *King v. Perkins*, Holt K.B. 403, 90 Eng. Rep. 1122 (1698).

do alone. *Cf.* Meese, *supra*, at 21 (the Founders viewed "our separate sovereign governments as rivals that would protect citizens from overzealous government, as opposed to cooperating prosecutors successively trying a defendant for the same offense"). Federalism principles thus can provide no justification for the dual-sovereignty exception to the Double Jeopardy Clause's protections.

II. CHANGES IN THE LEGAL BACKDROP SUPPORT ELIMINATION OF THE DUAL-SOVEREIGNTY EXCEPTION.

As noted above, this Court has applied a dual-sovereignty exception to the Double Jeopardy Clause over the last century, despite the lack of support for such an exception in the Constitution's text, history, or structure. Though prior precedent should be accorded strong weight, it must give way when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 855 (1992). Two legal developments—the incorporation of the Double Jeopardy Clause against the States and the exponential increase in the size of the federal criminal code—have substantially undermined whatever foundations might have initially supported the dual-sovereignty exception.

1. First, the incorporation of the Double Jeopardy Clause against the States dramatically undermines the rationale for the dual-sovereignty exception in the federal-state context. Until 1969, the Clause's protections did not apply to the States. *See Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) ("[T]he fifth amendment must be understood as restraining the power of the general government, not as applicable to the states."). "[T]he logic of *Barron v. Baltimore* furnished an important justification for the early dual

sovereignty doctrine." Amar & Marcus, *supra*, at 11. If a State could prosecute an individual as many times as it wanted for the same offense, or could prosecute him after he had already been prosecuted by the federal government, it was not unreasonable to think that the federal government could prosecute him after he had been prosecuted by the State.

When this Court last meaningfully considered the dual-sovereignty doctrine, in *Bartkus* and *Abbate*, it "leaned heavily on the prevailing view that the Fourteenth Amendment did not incorporate the Double Jeopardy Clause or the rest of the Bill of Rights." *Id.* at 9; *see Bartkus*, 359 U.S. at 124 ("We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such."); *Abbate*, 359 U.S. at 194 ("The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government . . . and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority." (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922))).

Indeed, "[t]his logic radiated beyond double jeopardy." Amar & Marcus, *supra*, at 11. The dual-sovereignty doctrine was applied in other contexts, such as the use of immunized testimony across state and federal jurisdictions. *See Feldman v. United States*, 322 U.S. 487, 491-92 (1944) (immunized testimony compelled by federal officials could nonetheless be used in state prosecutions). Similarly, as long as the Fourth Amendment's exclusionary rule did not apply to the States, the Court adopted a "dual sovereign" approach to the exclusion of illegally obtained evidence depending on which sovereign seized it and which sovereign

was seeking to use it. *See Weeks v. United States*, 232 U.S. 383, 398 (1914) (evidence seized unlawfully by federal officials could be used in state criminal proceedings).

In the years following *Bartkus* and *Abbate*, however, the Court recognized that most of the protections in the Bill of Rights, including the Double Jeopardy Clause, apply to the States via the Fourteenth Amendment. *See Benton*, 395 U.S. at 795-96 (double jeopardy); *see also, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth and Fifth Amendments); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (self-incrimination); *cf.* Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (Senator Jacob Howard, in introducing the Fourteenth Amendment, explained that its broad text protected against state infringement all of the "personal rights guaranteed and secured by the first eight amendments").

This Court also recognized that incorporating the Bill of Rights' protections against the States had critical implications for the viability of the dual-sovereignty exception in other areas of criminal procedure. In *Elkins v. United States*, 364 U.S. 206 (1960), for example, the Court reexamined the doctrine that permitted federal prosecutors to use evidence unlawfully seized by state officers. As the Court explained, the "foundation" of the doctrine—"that unreasonable state searches did not violate the Federal Constitution"—disappeared when the Court held in 1949 that the Fourth Amendment applied against the States. *Id.* at 213. Significantly, the Court underscored that the Fourteenth Amendment had recognized the Fourth Amendment's importance as an individual right that could be violated by either the federal government or state governments: "[t]o the victim it matters not

whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215.

Four years later, in *Murphy v. Waterfront Commission*, this Court again recognized that the dual-sovereignty exception was inconsistent with incorporation. The Court held that one jurisdiction could no longer compel a witness to give testimony that could be used to convict him of a crime in another jurisdiction. *Murphy*, 378 U.S. at 77. As the Court explained, the incorporation of the Incrimination Clause against the States "necessitate[d] reconsideration of [the dual-sovereignty] rule." *Id.* at 57.

Both *Elkins* and *Murphy* stand for the proposition that "the Fourteenth Amendment's emphasis on individual rights against all government trumps abstract notions of federalism, and . . . the federal and state governments should not be allowed to do in tandem what neither could do alone." Amar & Marcus, *supra*, at 16. They also reflect the common-sense notion that if a constitutional prohibition applies equally to state and federal actors, those actors should not be permitted to coordinate their actions to avoid the prohibition. Those principles are no less applicable in the context of the Double Jeopardy Clause than they are in the context of other criminal procedure issues.[7]

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[7] In the past, this Court has suggested that "undesirable consequences would follow if [the dual-sovereignty exception] were overruled. . . . [I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Abbate*, 359 U.S. at 195. But the fact that the government may be hindered in its ability to prosecute a person is not reason enough to decline to enforce a constitutional protection the Framers chose to include in the Bill of Rights. That reasoning would invalidate countless legal protections—from the right to a jury to the prohibition on unreasonable

As discussed earlier, that Clause was adopted to prevent an individual from being "subject[ed] . . . to embarrassment, expense and ordeal and compell[ed] . . . to live in a continuing state of anxiety and insecurity," and to avoid "enhancing the [greater] possibility that even though innocent he may be found guilty." *Green*, 355 U.S. at 187-88. A person experiences those harms whenever he is "twice put in jeopardy of life or limb," regardless of whether the second prosecution is brought by a different sovereign.

The Fourteenth Amendment's incorporation of the Double Jeopardy Clause's protections against the States thus underscores what the Constitution's text, history, and structure all make clear: the double jeopardy principle protects against successive prosecutions, regardless of the sovereigns bringing those prosecutions.

2. The continued application of the dual-sovereignty doctrine is also particularly troubling in an age of expansive federal criminal law and significant federal-state cooperation in law enforcement.

At the time the dual-sovereignty exception developed, the federal criminal code was sparse. As late as 1964, Justice White noted that "the States still bear primary responsibility in this country for the

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searches—all of which necessarily limit the government's power in order to protect individual liberty. In any event, even if the dual-sovereignty exception were overruled, it would only prohibit successive prosecutions for the "same offence." So long as state and federal laws covering certain conduct each "require[] proof of a different element," the Double Jeopardy Clause would not preclude prosecution by both sovereigns. *Blockburger*, 284 U.S. at 304. Thus, it is only in the rare case—like Gamble's—in which all elements of the two laws are the same that overruling the doctrine would affect the federal or state government's ability to prosecute.

administration of the criminal law; most crimes . . . are matters of local concern; federal preemption of areas of crime control traditionally reserved to the States has been relatively unknown and this area has been said to be at the core of the continuing viability of the States in our federal system." *Murphy*, 378 U.S. at 96 (White, J., concurring); *see The Federalist No. 45*, at 292 (James Madison) (Clinton Rossiter ed., 1961) (assuming that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined" while "[t]hose which are to remain in the State governments are numerous and indefinite").

Today, that assumption could not be further from the truth. The United States Code contains 27,000 pages of federal crimes. *See* Michael Pierce, *The Court and Overcriminalization*, 68 Stan. L. Rev. Online 50, 59 (2015). And as former Attorney General Meese has noted, "[f]ew crimes, no matter how local in nature, are beyond the reach of the federal criminal jurisdiction." Meese, *supra*, at 3. Thus, federal law now includes the following seemingly local crimes: "virtually all drug crimes, carjacking, blocking an abortion clinic, failure to pay child support, drive-by shootings, possession of a handgun near a school, possession of a handgun by a juvenile, embezzlement from an insurance company, and murder of a state official assisting a federal law enforcement agent." *Id.* (citations omitted).

To be sure, most prosecutions continue to be done at the state level, but the significant expansion of federal criminal law makes it much more likely that state and federal governments will have concurrent jurisdiction over the same criminal activity. This increasing jurisdictional overlap, combined with the dual-sovereignty exception, allows state and federal governments to circumvent double jeopardy prohibitions that would otherwise prevent a person from being prosecuted a

second time for the same offense. *See id.* at 6-7; *Ashe v. Swenson*, 397 U.S. 436, 445 n.10 (1970) (noting "the extraordinary proliferation of overlapping and related statutory offenses" and the resultant greater "potential for unfair and abusive reprosecutions," and recognizing the "need to prevent such abuses through the doctrine of collateral estoppel").

The possibility of successive prosecutions is especially acute in light of the increased federal-state cooperation in fighting crime. *See* Ryan, *supra*, at 31 ("State and federal law enforcement agencies regularly negotiate responsibility for investigating and prosecuting criminal activity punishable under both state and federal law, often involving drug trafficking, alien smuggling, racketeering, or conspiracy cases."). The dual-sovereignty doctrine makes it easy for federal and state governments to work together to subject individuals to repeated harassment for a single offense—exactly what the Double Jeopardy Clause was adopted to prevent. Allowing a State and the federal government to both prosecute an individual for the same offense would "give government an illegitimate dress rehearsal of its case and a cheat peek at the defense." Amar & Marcus, *supra*, at 10; *see Ashe*, 397 U.S. at 447 (the Double Jeopardy Clause prohibits the government from treating a "first trial as no more than a dry run for [a] second prosecution").[8]

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[8] The government argues that under the so-called *Petite* policy, the Department of Justice will "generally decline to authorize a successive federal prosecution unless it is justified by a substantial Federal interest that was 'demonstrably unvindicated' by the prior state prosecution." U.S. Resp. to Pet. 11 (quoting United States Attorneys' Manual § 9-2.031 (2009)). However, the public—and particularly a prospective criminal defendant—has virtually no guidance as to what that means. And a fundamental constitutional right like the prohibition on double jeopardy should

In short, the exponential increase in the size and scope of federal criminal law beyond anything the Court could have imagined the last time it seriously considered the dual-sovereignty doctrine make reconsideration of the doctrine even more necessary today. To prevent state and federal governments from cooperating to successively charge defendants for the same offense, this Court should overrule the dual-sovereignty exception.

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not "leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010). Moreover, even if the federal government follows this policy, it does nothing to prevent state governments from successively prosecuting individuals.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

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No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
Petitioners,
v.
STATE OF INDIANA,
Respondent.

On Writ of Certiorari
to the Indiana Supreme Court

BRIEF OF THE DKT LIBERTY PROJECT, CATO INSTITUTE, GOLDWATER INSTITUTE, DUE PROCESS INSTITUTE, FEDERAL BAR ASSOCIATION CIVIL RIGHTS SECTION, AND TEXAS PUBLIC POLICY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit organizations dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against all forms of government interference. *Amici* have a particular interest in this case because the unrestricted use of fines, fees, and civil forfeiture proceedings poses a grave threat to individual liberty and the right to use and enjoy property.

DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and protecting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance over regulation of all kinds, but especially those that restrict individual civil liberties. The Liberty Project has filed several briefs as *amicus curiae* with this Court on issues involving constitutional rights and civil liberties, including the freedom from unreasonable searches and seizures and the right to own and enjoy property.

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free

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[1] Blanket consents from both parties to the filing of *amici* briefs are on file with the Clerk. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The Goldwater Institute was established in 1988 as a non-partisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, policy briefings, and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, it litigates cases and files *amicus* briefs when its objectives or its clients' objectives are directly implicated. The Goldwater Institute has published a series of investigative reports, assisted in state-level asset-forfeiture and municipal-court reforms, and filed *amicus* briefs on the topic.

The Due Process Institute is a non-profit bipartisan public interest organization that works to honor, preserve, and restore procedural fairness in the criminal justice system.

The Civil Rights Law Section of the Federal Bar Association is committed to promoting the development of sound laws and policies in the civil rights field. The Section's members include civil rights attorneys (both

plaintiff and defense attorneys) as well as other practitioners who are interested in civil rights law.[2]

The Texas Public Policy Foundation ("TPPF") is a 501(c)(3) non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating policymakers and shaping the Texas public-policy debate with sound research and outreach.

Right on Crime is the trademarked name of TPPF's national criminal justice reform project. Right on Crime believes a well-functioning criminal justice system enforces order and respect for every person's right to property and ensures that liberty does not lead to license, and also that criminal-justice spending should be tied to performance metrics that hold it accountable for results in protecting the public.

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[2] The Civil Rights Law Section joins this brief in its name only and not in that of the Federal Bar Association. Neither this brief nor the Section's decision to join it should be interpreted to reflect the views of the Association or of any judicial member of the Association. No inference should be drawn that any judicial member has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any judicial member prior to filing.

SUMMARY OF ARGUMENT

"Individual freedom finds tangible expression in property rights," and history shows that this freedom cannot be secured when the government has absolute power to impose fines and forfeitures. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993); *see also* 3 Joseph Story, *Commentaries on the Constitution of the United States* 661 § 1784 (1833); Pet'r Br. 10-25 (recounting the abuse of fines by the English Crown and by state governments during Reconstruction). Respondent asks this Court to hold that state and local governments are entitled to this level of unrestricted power and that the Eighth Amendment's prohibition on the imposition of excessive fines does not apply to them. Under the Court's selective incorporation doctrine, Respondent is wrong for all of the reasons discussed in Petitioners' brief. *Amici* write separately to emphasize the current need for basic limitations on state and local governments' power to exact forfeitures and impose excessive fines and fees on individuals who come into contact with the criminal justice system.

Incentives matter, and state and local government officials are not immune from this basic principle of economics. In recent decades, state and local tax bases have decreased, while spending on criminal justice has increased. Faced with this economic reality, many state and local governments have turned to forfeitures, fines, and fees as a major source of revenue. This has led to excessive penalties like the one at issue here, where Petitioner Timbs's vehicle was forfeited even though the forfeiture was grossly disproportionate to the maximum

fine for his offense. More generally, the overzealous use of fines and forfeitures has distorted the criminal justice system in ways that threaten citizens' rights to liberty, property, and due process. *Amici* herein highlight some of the abuses that could go unchecked if this Court were to hold that the Excessive Fines Clause of the Eighth Amendment does not apply to the states.

First, amici discuss the exponential growth in the use of civil forfeiture by state and local governments and the perverse incentives civil forfeiture creates for law enforcement. By giving those responsible for enforcing the law a large share—if not all—of the bounty from civil forfeiture proceedings, states are encouraging the abuse of power. Indeed, this is the very same dangerous incentive structure that inspired the adoption of Eighth Amendment's Excessive Fines Clause and its predecessors in American and English law. Yet the lessons of the past have been lost in many jurisdictions, where the increased and egregious use of civil forfeiture is skewing law enforcement priorities and tilting the balance of power in plea bargaining even further in favor of the government.

Second, amici discuss the corresponding growth in the use of fines and fees by states and localities. As *amici* point out, the unrestricted use of fines and fees actually undermines the underlying goals of the criminal justice system. For incarcerated Americans, states often impose a flurry of additional fines on top of their sentences. This can prevent them from reintegrating into society by ensuring that their debt to society can never really be repaid. Further, for millions of Americans who struggle every day to lift themselves

out of poverty, excessive fines can actually foster criminality. These citizens have no assets to spare and hardly any ability to absorb the costs of an excessive fine. They are also disproportionately likely to bear the brunt of a state or local government's efforts to raise revenue through a scheme of fines. For these Americans especially, the unrestricted use of fines and fees poses a serious threat to their liberty.

These are precisely the types of social costs that the Eighth Amendment's Excessive Fines Clause was designed to prevent. The Excessive Fines Clause limits the government's power to collect fines "for improper ends." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (1989). It does so mainly by prohibiting fines that are "grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). When used judiciously and proportionately, fines are an effective tool for deterring criminal behavior and punishing offenders. *See Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.). But as Petitioners recount in their brief, our legal tradition has long understood that this power can be easily abused. Pet'r Br. 10-25. And the greatest risk of abuse comes when those who have the power to impose fines have a financial interest in the fines they collect. *See Browning-Ferris*, 492 U.S. at 268-73; *Harmelin*, 501 U.S. at 978 n.9.

Applying the Excessive Fines Clause to the states will at least mitigate some of the more egregious uses of forfeitures, fines, and fees in the United States. For all of these reasons, this Court should reverse the judgment of the Indiana Supreme Court.

ARGUMENT

I. The Unrestricted Use of Civil Asset Forfeiture Undermines Due Process and Tramples on Property Rights.

In 1990, Attorney General Dick Thornburgh issued a memorandum urging his United States Attorneys to seize more property from American citizens and businesses. "Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990," he wrote. *James Daniel Good*, 510 U.S. at 56 n.2 (quoting 38 United States Att'y Bulletin 180 (1990) (alterations in original)).

This was a new priority for the Department of Justice. Only six years earlier, Congress had ushered in the modern practice of civil asset forfeiture, whereby law enforcement could "seize property with limited judicial oversight and retain it for their own use." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Mem.) (Thomas, J., concurring in the denial of certiorari). As part of the 1984 amendments to the Comprehensive Drug Abuse Prevention and Control Act, Congress created the Asset Forfeiture Fund, which allowed the Department of Justice to keep 100% of the proceeds from the assets it seized and use those proceeds to fund various departmental operations. Comprehensive Forfeiture Act of 1984, Pub L. No. 98-473, § 310, 98 Stat. 1837, 2040, 2052 (codified at 28 U.S.C. § 524(c)).

Civil forfeiture began primarily as a tool to combat piracy and enforce customs regulations on the high seas, where *in personam* actions against the owners of the property were often impossible. *Leonard*, 137 S. Ct. at

848; *see also* Dick M. Carpenter II et al., Inst. For Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 10 (2d ed. 2015). But by letting those responsible for seizing property keep the assets and benefit from the proceeds, Congress injected a powerful new incentive for federal law enforcement to seize private property from Americans. *See James Daniel Good*, 510 U.S. at 56 & n.2. It did not take long for prosecutors to respond to this new incentive. In 1986, the Asset Forfeiture Fund took in $93.7 million in assets. Carpenter et al., *Policing for Profit* at 5. By 1989, that number had risen to $580.8 million, an increase of more than 500%.[3]

The income from civil forfeitures continued to skyrocket in the following years. By 2014, the Departments of Justice and Treasury seized more than $5 billion worth of assets, an increase of $4,667% from 1986.[4] To be clear, that is more than $5 billion worth of cars, cash, houses, bank accounts, and other valuables that previously belonged to American citizens and businesses. That was more than burglars took from

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[3] *See* U.S. Dep't of Justice, Office of Attorney General, *Annual Report of the Department of Justice Asset Forfeiture Program 1991* 54, https://www.ncjrs.gov/pdffiles1/digitization/156256ncjrs.pdf.

[4] *See* Christopher Ingraham, *Law Enforcement Took More Stuff From People Than Burglars Did Last Year*, Wash. Post Wonkblog (Nov. 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/?utm_term=.c81aa1dc0cda; Carpenter et al., *Policing for Profit* at 10.

American citizens in the same year, according to FBI figures.[5]

This same explosion in the use of civil forfeiture also began to take hold at the state and local levels. Shortly after Congress created the Asset Forfeiture Fund, states began passing their own civil-forfeiture statutes modeled on the federal government's lucrative program. Today, 44 states authorize law enforcement to keep at least 45% of the assets they seize. Carpenter et al., *Policing for Profit* at 14. In 30 states, law enforcement keeps 90% or more of the bounty. *Id.*

As a result, civil forfeiture at the state and local level has "become widespread and highly profitable." *Leonard*, 137 S. Ct. at 848. Unlike the federal government, many state and local agencies operate their civil-forfeiture programs with little or no transparency. So it is hard to know just how excessively state and local governments are using civil forfeiture. However, the available data show that state and local agencies in 26 states and the District of Columbia seized more than $254 million in assets in 2012. Carpenter et al., *Policing for Profit* at 11. And data from 14 states show that civil-forfeiture income grew by 136% between 2002 and 2013. *Id.*

The current use of civil forfeiture at the state and local level affects the administration of criminal justice in several pernicious ways.

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[5] *See* Ingraham, *Law Enforcement Took More Stuff*; Carpenter et al., *Policing for Profit* at 5.

1. Most importantly, once agencies are given the opportunity to benefit directly from the assets they seize, they acquire a strong incentive to view more of the property they encounter as "suspicious" or otherwise subject to forfeiture. For example, police officers patrolling roads and highways routinely ask drivers whether they are carrying quantities of cash during traffic stops, and then seize the money if the answer is yes, as though it were a crime to carry legal tender while traveling within the United States. *See, e.g., Testimony Slams Drug Team Tactics*, Miami Herald, Apr. 29, 1994, at B5. Of course, sometimes the money seized *is* connected with criminal activity. In those cases, forfeiture potentially can serve as a useful tool for deterring and punishing criminal behavior. But the incentive to err on the side of seizure has led to countless examples of innocent Americans having their money taken while traveling to make large purchases or to move to a new community.

The cost of these false positives are compounded by the relative lack of protections afforded by the typical forfeiture proceeding. As Justice Thomas has observed, these proceedings "often lack certain procedural protections that accompany criminal proceedings such as the right to a jury trial and a heightened standard of proof." *Leonard*, 137 S. Ct. at 847-48; *see also* Carpenter et al., *Policing for Profit* at 11-12. For average citizens, the results of this system can be catastrophic even if they can somehow manage to prove their innocence. As this Court has previously explained in a similar context, "the availability of a postseizure hearing may be no

recompense for losses caused by erroneous seizure." *James Daniel Good*, 510 U.S. at 56.

The Court need look no further than to Fairfax County, Virginia for confirmation. In August 2012, county police pulled Mandrel Stuart over for a minor traffic violation.[6] During the stop, police discovered $17,550 in Mr. Stuart's car, which he intended to spend on equipment and supplies for his barbecue restaurant.[7] Police seized the cash, claiming that the money Mr. Stuart had earned from his business was in fact drug money.[8] Fortunately for Mr. Stuart, he had the means to hire an attorney and won a unanimous jury verdict for the return of his money.[9] Unfortunately for Mr. Stuart, the process took 14 months, and his business folded in the meantime because it lacked the cash flow to keep operating.[10]

2. The excessive use of civil forfeiture, and the profit-motive underlying that use, also affects which laws get enforced. For example, researchers have found that enforcement of drug laws is far higher in communities where state law allows police to retain the assets they seize. *See* Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 Pub. Choice 285, 285

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[6] Robert O'Harrow Jr., Michael Sallah, & Steven Rich, *They Fought the Law. Who Won?*, Wash. Post (Sept. 8, 2014), https://www.washingtonpost.com/sf/investigative/2014/09/08/they-fought-the-law-who-won/?utm_term=.69ec3b9e7c74.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

(2000); *see also* Beth A. Colgan, *Fines, Fees, and Forfeitures* in *Reforming Criminal Justice – Volume 4: Punishment, Incarceration, and Release* 205, 210-11 (Erika Luna ed. 2017); Bart J. Wilson & Michael Preciado, Inst. for Justice, *Bad Apples or Bad Laws?: Testing the Incentives of Civil Forfeiture* (2014); John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. Crim. Just. 171 (2001). Indeed, "[l]egislation permitting police to keep a portion of seized assets raises drug arrests as a portion of total arrests by about 20 percent and drug arrest rates by about 18 percent." Mast et al., *Entrepreneurial Police* at 301, 303. That is true even when controlling for the level of drug use in a community. *Id.* at 285.

These effects are unsurprising given the incentive structure in place when law enforcement agencies are permitted to keep the proceeds of civil forfeiture and when some crimes are more likely than others to yield those proceeds. In such situations, "like market entrepreneurs, entrepreneurial bureaucracy will respond to relative prices. When the price they expect to be 'paid' to do one thing rises relative to what they expect to be paid to do another, they will reallocate resources." *Id.* at 303.

The incentive structure underlying modern civil forfeiture likewise affects *how* agencies choose to enforce the law. And the choices agencies make are not always in the best interests of the communities they serve. In 2014, investigative journalists in Tennessee found that drug task force officers were far more likely to stop drivers in the westbound lanes of Interstate 40

than in the eastbound lanes. Carpenter et al., *Policing for Profit* at 16. The reason? Smugglers were known to transport drugs to the East Coast using the eastbound lanes of the interstate, and they were known to bring the cash back through Tennessee using the westbound lanes. *Id.* Focusing on the westbound lanes led to bigger cash hauls for the police.

Similarly, in 1989, police in a medium-sized city surveilled a stash house known to contain $7,000 to $13,000 worth of cocaine. But according to researchers, police waited to raid the house until the dealers had dwindled their supply so that there would be more cash to seize. J. Mitchell Miller and Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 Just. Q. 313, 328 (1994). In the words of one of the co-authors who had witnessed this operation first-hand, "[l]ess drugs meant more cash, and the agent's objective was to seize currency rather than cocaine." *Id.* "The case was successful as to proceeds," the authors remarked, "but perhaps not in view of the quantity of cocaine that officers knowingly permitted to reach consumers." *Id.* In other words, police sometimes choose to let dealers spread dangerous drugs in their communities so that they—the police—can benefit from the proceeds later.

3. Unsurprisingly, the unchecked use of civil forfeiture "has led to egregious and well-chronicled abuses," *Leonard* 137 S. Ct. at 848. These abuses are a predictable outcome whenever the government's coercive power is coupled with an incentive to use that power for monetary gain. Often, civil-forfeiture proceedings take the form of a classic shake-down, the

very sort of thing that was notoriously common in Stuart England. *See* Pet'r Br. 11-16. The Court is already familiar with the abuses in Tenaha, Texas, where police "regularly seized the property of out-of-town drivers passing through and collaborated with the district attorney to coerce them into signing waivers of their property rights." *Leonard*, 137 S. Ct. at 848.

But even when it is not quite so egregious, civil forfeiture still encourages garden-variety graft and irresponsible behavior. In a candid interview with the Citizens Police Review Board of Columbia, Missouri, Police Chief Kenneth Burton explained how his department approached civil forfeiture: "[w]e just usually base it on something that would be nice to have that we can't get in the budget."[11] He went on to describe the proceeds from civil forfeiture as "kind of like pennies from heaven—it gets you a toy or something that you need is the way that we typically look at it to be perfectly honest."[12]

Indeed, that is how many state and local law enforcement agencies look at it—as a chance to get a "toy." In 2007, for example, a sheriff in Georgia who had overseen the seizure of around $20 million in assets was found to have spent the money on a sports car, a boat,

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[11] Laurien Rose, *Police Chief Ken Burton Calls Forfeiture Funds 'Pennies from Heaven'*, the Maneater (Nov. 27, 2012), https://www.themaneater.com/stories/outlook/police-chief-ken-burton-calls-forfeiture-funds-pen.

[12] *Id.*

and tuition for his deputies.[13] In Tenaha, Texas, police used forfeiture proceeds to buy a popcorn machine, candy, and catering services. Carpenter et al., *Policing for Profit* at 16. Other departments used their forfeiture proceeds to pay for clowns, coffee makers, luxury cars and pick-up trucks, trips to ski resorts, and a subscription to *High Times* Magazine.[14]

4. The use of civil forfeiture in the plea-bargaining process also raises numerous concerns. This is particularly problematic given the ubiquity of plea bargaining. As this Court has explained, plea bargaining "is not some adjunct to the criminal justice system, it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L. J. 1909, 1912 (1992)). Approximately 94% of all criminal cases in state courts result in guilty pleas. *Id.*; *see also Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (noting that pleas account for 95% of state and federal convictions).

Like the federal government, the states generally allow settlement of criminal charges and civil-forfeiture proceedings in a single global settlement. The federal government places some restrictions on such

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[13] John Burnett, All Things Considered, *Sheriff Under Scrutiny Over Drug Money Spending*, National Public Radio (June 18, 2008), http://www.npr.org/templates/story/story.php?storyId=91638378&ps=rs.

[14] Robert O'Harrow Jr., Steven Rich & Shelly Tan, *Asset Seizures Fuel Police Spending*, Wash. Post (Oct. 11, 2014), https://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/?utm_term=.c94295c64e72.

settlements—namely that the "Government should *not* agree to release property subject to forfeiture (civil or criminal) in order to *coerce* a guilty plea on the substantive charges, nor should the Government agree to dismiss criminal charges in order to *coerce* a forfeiture settlement."[15] However, states generally do not have such written policy restrictions.

For example, West Virginia "has no written policy specifically addressing the settlement of asset forfeiture cases through criminal plea bargains." Joseph Cramer, Note, *Civilizing Criminal Sanctions—A Practical Analysis of Civil Asset Forfeiture Under the West Virginia Contraband Forfeiture Act*, 112 W. Va. L. Rev. 991, 1013 (2010). As a result, "[p]rosecutors in criminal cases have wide discretion in deciding who to charge, what charges to bring, and the manner in which charges are pursued" and this "discretion extends to deciding the terms of plea agreements" including asset forfeiture. *Id.* There is thus every incentive for a prosecutor to use civil forfeiture as a bargaining chip in plea negotiations with a defendant. As one commentator has observed, "the threat of forfeiture is a powerful bargaining tool in the hands of the prosecutor." Lindsey N. Godfrey, Note, *Rethinking the Ethical Ban on Criminal Contingent Fees: A Commonsense Approach to Asset Forfeiture*, 79 Tex. L. Rev. 1699, 1722 (2001).

Likewise in Florida, there is a significant concern that "convictions by plea bargain could present the unusual circumstance of criminal defendants turning

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[15] U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* 88 (2016), https://www.justice.gov/criminal-afmls/file/839521/download.

over their property in an effort to lessen their sentence, which could be interpreted as effectively paying off the state to achieve a lesser sentence." Brittany Brooks, Note, *Misunderstanding Civil Forfeiture: Addressing Misconceptions About Civil Forfeiture with a Focus on the Florida Contraband Forfeiture Act*, 69 U. Miami L. Rev. 321, 340 (2014). The worry is that "the state's judgment in sending criminals to jail might be impaired by the attraction of assets offered up in plea agreements by wealthy criminal defendants." *Id.* Civil forfeiture thus can create perverse incentives not only for police, but also for prosecutors.

5. Civil forfeiture wreaks havoc on Americans living in poverty by taking key assets from those who can least afford to lose them. Take cars for example. In many cities and towns, it is extremely difficult to hold down a job, shop for groceries and other necessities, or deal with any number of life's contingencies without access to a car. For people in these communities, losing a car can throw life into disarray. Yet vehicles are one of the assets that civil-forfeiture programs prize the most.

In general, as Justice Thomas has observed, poor Americans "are often the most burdened by forfeiture" and "are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home." *Leonard*, 137 S. Ct. at 848. And many Americans have no means at all to fight an unjust forfeiture. Without the basic protections afforded by the Eighth Amendment's Excessive Fines Clause, poor Americans will continue to have little defense against state and local agencies that are eager to take their property.

II. The Unrestricted Use of Traditional Fines Poses A Serious Threat to Americans' Liberty.

The same perverse incentives are at work in the way state and local governments impose fines and fees upon those Americans who come into contact with law enforcement and the criminal justice system. Since 2010, 48 states have increased their civil and criminal fines and fees. Joseph Shapiro, *Morning Edition: Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, National Public Radio (May 21, 2014). This was, at least in part, in response to exploding prison populations and corresponding growth in criminal justice budgets. From 1983 to 2001, incarceration rates in the United States more than doubled. *See* Karin D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create* 3 (2017). Between 1980 to 2000, the number of people on probation or parole rose dramatically from 1.84 million to 6.47 million. *See* Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* 133 (2009).

In order to help pay the costs associated with bringing so many new people into the criminal justice system, states increased their criminal justice budgets from roughly $35 billion to $130 billion per year between 1982 and 1997. *Id.* at 157.

Fines and fees presented themselves as an attractive option for funding these new expenditures. By imposing fines on those convicted of offenses (whether serious or petty), and fees on those who are charged with a crime or incarcerated due to conviction, state and local governments could raise revenue for their criminal

justice systems while avoiding politically unpopular tax increases. In some cases, local governments came to rely heavily on fines and fees as a way to generate revenue. For example, in Ferguson, Missouri, fines, fees, and forfeitures accounted for more than 20% of the city's general revenue fund in 2013.[16] The overall impact of this policy is staggering. Today, 10 million people in the United States collectively hold more than $50 billion in criminal debt—an average of $5,000 per person. *See* Martin et al., *Shackled to Debt* at 5.

As with civil forfeiture, efforts to make the criminal justice system pay for itself skews law enforcement priorities. This can take the form of overcharging individuals in order to squeeze the most revenue possible from them, raising the fines associated with certain offenses, or even criminalizing behaviors that were, until recently, completely innocent.

Consider, for example, fines imposed by Seattle, Miami Beach, Honolulu, and other cities against people who engage in "home-sharing"—*i.e.*, renting out their homes to visitors on nightly or weekly bases through the use of websites like Airbnb. These fines (now the subject of litigation by amicus Goldwater Institute) are excessive by any measure: Miami Beach imposes fines of $20,000 to $100,000 *per violation* on home-sharers who rent outside of a small zone in North Beach,[17] and

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[16] U.S. Dep't of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* 9 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[17] Goldwater Inst., *Challenging the Highest Home-Sharing Fines in the Nation* (June 27, 2018), https://goo.gl/UCFe88.

Honolulu fines $10,000 *per day*, Christina Sandefur, *Life, Liberty, and the Pursuit of Home-Sharing*, Regulation, Fall 2016, at 12-13—all for exercising what this Court has called "one of the most essential sticks in the bundle of rights that are commonly characterized as property"—namely, the right to choose whom to allow to stay in one's home. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

1. Like civil forfeiture, the excessive use of fines and fees imposes severe financial hardships on ordinary Americans. Many families saddled with criminal debt find themselves having to choose between paying for food and shelter and paying down their criminal debt. *See* Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 J. Criminology & Pub. Pol'y 509, 517 (2011). The choice is obviously a tragic one because carrying criminal debt can have disastrous consequences. It can damage people's credit ratings, prevent them from expunging their criminal records, and cause them to lose their professional licenses or driver's licenses. Colgan, *Fines, Fees, and Forfeitures* at 211.

But most importantly, failing to pay criminal debt can result in prison or jail time. Indeed, despite this Court's holding in *Bearden v. Georgia*, 461 U.S. 660 (1983), that a person cannot be imprisoned for a non-willful failure to pay a fine or fee imposed by a court, many Americans languish in prisons and jails today simply because they cannot afford to pay their fines or fees. For example, investigators found that on any given day in Benton County, Washington, one in four of the people in jail for misdemeanor offenses in 2013 "were

there because they had failed to pay their court fines and fees." Shapiro, *Debtors Prisons*.

This results in part from the *Bearden* "exception" that many states have created for non-payment of fines or fees that were imposed as a part of a plea bargain. In these states, courts determine that in cases in which a defendant agreed to pay fines or fees as part of a plea bargain, any default on these terms is willful and thus the defendant can be jailed. *See generally* Ann K. Wagner, *The Conflict Over* Bearden v. Georgia *in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors' Prison*, 2010 U. Chi. Legal F. 383 (discussing cases). Thus, when defendants agree to pay fines rather than serve prison time, the defendants may still end up in prison even where their inability to pay is due to circumstances beyond their control.

For example, in April 2012, Thomas Barrett pleaded guilty to stealing a $2 can of beer from a convenience store in Georgia. Human Rights Watch, *Profiting From Probation: America's "Offender-Funded" Probation Industry* 34 (2014). The court sentenced Mr. Barrett to a $200 fine and 12 months' probation. *Id.* But Mr. Barrett could not afford to pay the more than $1,000 in probation servicing fees that he was quickly charged. He soon found himself in jail for over a month for failing to pay an $80 "start-up" fee. *Id.* After that ordeal, Mr. Barrett resorted to selling his plasma to pay his probation fees. But it was not enough. By February 2013, Mr. Barrett found himself back in jail because he could not pay the crushing fines imposed on him for a truly petty offense. *Id.* at 34-35.

In 2014, Eileen DiNino—a mother of seven from Berks County, Pennsylvania—was sentenced two days in jail for failing to pay $2,000 in fines related to her children's truancy.[18] Ms. DiNino's situation was not unusual: the county had incarcerated 1,626 people for failing to pay truancy fines from 2000 to May 2013.[19] And in fact, Ms. DiNino's two-day sentence was considered a "deal" for her because she was facing up to 45 days in jail for her unpaid fines.[20] But Ms. DiNino did not live to serve out her sentence. She was taken into custody on Friday and found dead in her cell on Saturday afternoon. Reacting with sadness and anger to the tragedy, the district court judge remarked that "[t]his woman should not have died alone in prison."[21] He added that "[o]ur ultimate goal is not to fine people or put them in jail, but that is the only tool the Legislature has given us when people can't afford to pay."[22]

2. The excessive use of fines and fees by state and local governments imposes particularly egregious hardships on persons who are already incarcerated. In 1991, only a quarter of prison inmates were assessed fines, but by 2004, that figure had risen to two-thirds. Alexes Harris, et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in Contemporary United States*, 115 Am. J. Sociology 1753, 1785-86 (2010). The

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[18] Dan Kelly, *Woman in Berks County Prison for Truancy Found Dead in Her Cell*, Reading Eagle (June 11, 2014), http://www.readingeagle.com/news/article/woman-in-berks-county-prison-for-truancy-found-dead-in-her-cell.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

vast majority of incarcerated persons rack up tremendous debt due to fees imposed while they are in prison. Researchers in 2005 found that 90% of individuals in jail or prison were regularly charged extremely high fees for things such as medical care, work release programs, and telephone use. Martin et al., *Shackled to Debt* at 5. And the fines and fees do not cease after release from prison. Approximately 85% of people on probation or parole are required to pay supervision fees, fines, and restitution. *Id.* All told, individuals who have been incarcerated—and their families—incur an average of $13,607 in fines and fees. Saneta deVuono-Powell et al., *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, Forward Together, Research Action Design 9 (Sept. 2015).

That excessive amount of debt is more than enough to keep many individuals who have been incarcerated in poverty and prevent them from reintegrating into society. As one commentator has observed, these fines and fees serve only to "reinforce poverty, destabilize community reentry, and relegate impoverished debtors to a lifetime of punishment because their poverty leaves them unable to fulfill expectations of accountability."[23] Thus, state and local use of excessive fines and fees on incarcerated persons both before and after release

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[23] *See* Alana Semuels, *The Fines and Fees That Keep Former Prisoners Poor*, Atlantic (July 5, 2016), https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026 (quoting Alexes Harris, *A Pound of Flesh: Monetary Sanctions for the Poor* (2016)).

actually undermines the very law enforcement goals they are supposed to be achieving.

* * *

State and local governments have increasingly turned to forfeiture, fines, and fees as a means of raising revenue. This system creates perverse incentives because those who are charged with enforcing the law also have a profit motive for their enforcement. The effects of this system are felt most harshly by those who can least afford it. If this Court holds that state and local governments are not bound by the strictures of the Eighth Amendment's Excessive Fines Clause, the abuses of power chronicled herein will only increase.

CONCLUSION

The judgment of the Indiana Supreme Court should be reversed.

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No. 17-1091

In the Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Writ Of Certiorari
To The Indiana Supreme Court

BRIEF OF DRUG POLICY ALLIANCE, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AMERICANS FOR PROSPERITY, THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, FREEDOMWORKS FOUNDATION, THE LAW ENFORCEMENT ACTION PARTNERSHIP, AND OTHERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Drug Policy Alliance, the National Association for the Advancement of Colored People, Americans for Prosperity, the Brennan Center for Justice at NYU School of Law, FreedomWorks Foundation, the Law Enforcement Action Partnership, the Independence Institute, Libertas Institute, the Drug Policy Forum of Hawai'i, the Colorado Criminal Defense Bar, Alabama Appleseed Center for Law and Justice, and the Rio Grande Foundation. Although they have diverse missions and perspectives, *amici* share a commitment to improve the welfare of all Americans by curbing governmental abuse of asset forfeiture laws. *Amici* believe that the modern experience with asset forfeiture counsels in favor of holding that the Eighth Amendment's Excessive Fines Clause is incorporated and applies to the states.

SUMMARY OF THE ARGUMENT

Although history drives much of the modern incorporation analysis, the contemporary importance of a right protected by one of the first eight amendments to the Constitution is also significant in evaluating whether the right is incorporated against the states.

The modern experience with civil asset forfeiture provides a stark example of the abuse of power the Excessive Fines Clause was meant to curtail, and that

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[1] All parties have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

abuse demonstrates why the right should be incorporated through the Fourteenth Amendment.

Congress expanded the federal asset-forfeiture regime in the 1970s in an effort to cripple drug-trafficking organizations and their kingpins, and the federal experiment led the states to adopt their own follow-on statutes. These days, however, states do not seize the assets of drug kingpins (if they ever did), but of ordinary Americans, often with little or no connection to criminal activity. And, because the proceeds of a forfeiture proceeding often go to the enforcement agency itself, state agencies employ these proceedings as a mechanism for funding their operations — with assets seized predominantly from the poor and people of color.

Worse, asset-forfeiture proceedings often do not afford the procedural protections deemed essential in the criminal-law enforcement context. States take money and property from Americans in civil proceedings without charging (let alone convicting) them of any crime, and without providing any of the other protections that usually attend criminal proceedings.

This Court has already held that forfeitures can be "fines" under the Eighth Amendment. It should now hold the Excessive Fines Clause is incorporated against the states. Doing so will better safeguard the rights of all Americans against this troubling abuse of governmental power — whatever its source.

ARGUMENT

I. The Incorporation Inquiry Considers The Importance Of A Right And Its Function In Contemporary Society.

The question before the Court is whether the "Framers and ratifiers of the Fourteenth Amendment counted the right" contained in the Excessive Fines Clause "among those fundamental rights necessary to our system of ordered liberty." *McDonald* v. *City of Chicago*, 561 U.S. 742, 778 (2010).

In addressing that question, the original understanding is of course significant, but the "inquiry must focus upon the function served" by the right in "contemporary society." *Apodaca* v. *Oregon*, 406 U.S. 404, 410 (1972) (plurality opinion); see also *Duncan* v. *Louisiana*, 391 U.S. 145, 154 (1968) (noting that the right to a jury in criminal trials "continues to receive strong support"); *Klopfer* v. *North Carolina*, 386 U.S. 213, 226 (1967) (noting the prominence of the right to a speedy trial "today").

Indeed, "the Court has either explicitly or implicitly made clear in its [incorporation] opinions that the right in question [must] ha[ve] remained fundamental *over time*" in order to be deemed incorporated. *McDonald*, 561 U.S. at 917–18 (Breyer, J., dissenting) (emphasis added); see also *id.* at 787 (opinion of Alito, J.) (recognizing the "present day implications" of parties' arguments and rejecting the argument that the "scope of the Second Amendment right is defined by the immediate threat that led to the inclusion of that right in the Bill of Rights"); *id.* at 873 (Stevens, J., dissenting) ("[S]ubstantive due process analysis — from which . . . 'incorporation'

analysis derives — must not be wholly backward looking.").

Petitioner ably explains why the original understanding favors incorporation of the Excessive Fines Clause. *Amici* respectfully submit that the modern experience with civil asset forfeiture provides additional, strong support for incorporation.

II. The Modern Experience With Asset Forfeiture Demonstrates Why The Excessive Fines Clause Should Be Held To Be Incorporated.

A. Congress Significantly Altered And Expanded The Forfeiture Landscape Starting In The 1970s And 1980s.

Asset forfeiture had "humble beginnings in maritime law." Rachel L. Stuteville, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture To Take From Property Owners and Pad the Pockets of Local Government—The Righteous Hunt for Reform Is On*, 46 Tex. Tech L. Rev. 1169, 1174 (2014). But it was little used until the "War on Drugs."

Starting in the 1970s and continuing through the 1980s, the Government came to believe that asset forfeiture could be a powerful tool in its efforts to curtail drug trafficking. For example, a 1981 report from the Government Accountability Office to the Chair of the Senate Criminal Justice Subcommittee stated that forfeiture was not being used to its full potential to take "the profit out" of the drug trade, and recommended that forfeiture be an "additional dimension in the war on drugs." Milton J. Socolar, Comptroller General, *Asset Forfeiture — A Seldom Used Tool In Combatting Drug Trafficking* (1981),

https://bit.ly/2Npcmm3. The Department of Justice articulated the similar view that forfeiture could be used to confront the "high echelon criminal elements who are isolated from the distribution of drugs but who direct, control, and profit from the drug traffic." U.S. Department of Justice, Drug Abuse Policy Office, and Office of Policy Development, *National Strategy for Prevention of Drug Abuse and Drug Trafficking* 51 (Sept. 1984) ("DOJ National Strategy"), https://bit.ly/2NQ9USu.

Consistent with these objectives, over time Congress significantly broadened the categories of assets state and federal officers could seize. Thus, in 1970, Congress enacted two statutes permitting the seizure of controlled substances, raw materials, and any equipment involved in their production and distribution. Organized Crime Control Act, Pub. L. No. 91–452, 84 Stat. 922 (1970); Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91–513, 84 Stat. 1236 (1970). In 1978, Congress allowed for the forfeiture of money and other objects of value furnished or intended to be furnished "in exchange for a controlled substance" and "all proceeds traceable to such an exchange." Psychotropic Substances Act, Pub. L. No. 95–633, 92 Stat. 3768. Then, in 1984, it allowed for the forfeiture of real property connected to a drug crime. Comprehensive Crime Control Act, Pub. L. No. 98–473, 98 Stat. 1837 (1984); see also S. Rep. No. 225, 98th Cong., 1st Sess. (1983) ("In recent years the Justice Department and other federal agencies have made a concerted effort to increase the use of forfeiture in narcotics and racketeering cases," and that the 1984 statute was "intended to eliminate the statutory limitations and ambiguities that have

frustrated active pursuit of forfeiture by federal law enforcement agencies.").

By the mid-1980s, having expanded the federal forfeiture laws to reach all species of property connected to drug offenses, Congress began to enlarge federal law to enable enforcement agencies to target the proceeds of many other crimes as well. Congress permitted forfeiture of money laundering proceeds in 1986, Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207; proceeds from the unlawful receipt of loan commissions, embezzlement by bank employees, and bank fraud in 1989, Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101–73, 103 Stat. 504; and proceeds from mail fraud, wire fraud, altering motor vehicle identification numbers, armed robbery of automobiles, and transporting stolen motor vehicles in the early 1990s, Crime Control Act of 1990, Pub. L. No. 101–647, 104 Stat. 4874 (1990); Anti Car Theft Act of 1994, Pub. L. No. 102–519, 106 Stat. 3384 (1992). The federal civil forfeiture statute, first enacted in 1986, now reaches the proceeds of a wide array of crimes, as well as conspiracy to commit them. See 18 U.S.C. § 981.

The War on Drugs led Congress to alter the forfeiture landscape along another dimension as well. In 1984, in an effort to incentivize enforcement agencies to reduce the profits from the drug trade, Congress began to permit the agencies to retain forfeited assets. Specifically, Congress enacted two key amendments. First, while all assets seized through forfeiture proceedings under the prior regime had been deposited into the general fund of the U.S. Treasury, the Act created a new "Department of Justice Assets Forfeiture Fund," into which seized

assets were deposited. See Comprehensive Crime Control Act, Pub. L. No. 98–473, 98 Stat. 1837, 2051 (removing reference to the "general fund of the United States Treasury" and establishing a "special fund to be known as the Department of Justice Assets Forfeiture Fund"). The Fund's assets could be used for future enforcement activities, and the Fund was intended to be "self-sustaining." *Id.*; Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 Ariz. St. L.J. 683, 695 (2014).

Second, in an effort to encourage cooperation from state and local law-enforcement partners in the War on Drugs, the Comprehensive Crime Control Act of 1984 provided the Attorney General authority to transfer to state or local law-enforcement agencies a share of forfeiture proceeds, through a program referred to as "Equitable Sharing." See Pub. L. No. 98–473, § 309, 98 Stat. 1837, 2051 (referring to the "equitable transfer" of forfeited property to state or local law enforcement); Office of the Inspector General, U.S. Department of Justice, *Review of the Department's Oversight of Cash Seizure and Forfeiture Activities* 7–8 (March 2017) ("DOJ Review"), https://bit.ly/2oxYt4S. As implemented by the Attorney General, the Equitable Sharing program allows state and local law enforcement to receive up to eighty percent of forfeiture proceeds. DOJ Review, *supra*, at 7–8.[2]

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[2] *Id.* at 1, 8 (noting that the DOJ has provided over $6 billion to state and local enforcement through the equitable sharing program in fiscal years 2000 to 2016); U.S. Department of Justice, *Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement*

B. States Adopted Forfeiture Laws Modeled On The Federal Example, With Perverse Consequences.

The federal experiment inspired many states to enact their own forfeiture statutes. By 1984, thirty-six states had adopted various aspects of the federal Drug Enforcement Agency's model forfeiture law. DOJ National Strategy, *supra*, at 51.

Today, many states have forfeiture statutes that are just as broad in application as the federal counterpart, and many of the state statutes permit the enforcement agency to retain at least part of the assets seized through forfeiture proceedings. See, *e.g.*, Utah Code Ann. § 24-4-115(3); W. Va. Code § 60A-7-706; Mass. Gen. Laws ch. 94C, § 47(d); see also Dick M. Carpenter II et al., Institute for Justice, *Policing for Profit, The Abuse of Civil Asset Forfeiture* 14–16 & Appendix B (Nov. 2015) ("Policing for Profit") (surveying state laws), https://bit.ly/2CoVh7l; Bruce L. Benson & David W. Rasmussen, *Predatory Public Finance and the Origins of the War on Drugs 1984–1989*, 1 The Indep. Rev., no. 2, Fall 1996, at 163, 185 (noting that numerous states have "forfeiture laws" that cover the proceeds of "any criminal activity").

In states with these laws on the books, forfeiture proceedings are a way to fill budgetary needs, one that does not involve the typical democratic process with city councils, county commissions, or state legislatures, as the case may be. In the words of one city attorney, civil asset forfeiture is a pure "gold mine," or as one local police chief described it, "pennies

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Agencies, at 9–10 (July 2018), https://bit.ly/2o2NBOk ("The ***minimum*** federal share is 20 percent.").

from heaven." *Policing for Profit*, *supra*, at 15 (quoting former Las Cruces, N.M., city attorney Harry S. "Pete" Connelly, Jr. and Columbia, Mo., police chief Kenneth M. Burton). Indeed, many local authorities have come to rely on asset forfeiture to fund their local budgets. See, *e.g.*, John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. Crim. Just. 171, 171–87 (2001) (reporting results of survey of 1400 law enforcement agency chiefs, and noting that nearly 40% of responding agencies agreed that civil asset forfeiture was necessary as a budget supplement).

Dependency on civil asset forfeiture to fund the operations of law enforcement does not just create perverse incentives. It also undermines the rule of law, in the same way that over-reliance on court fees and fines places law enforcement and the judiciary in the role of bill collector, rather than arbiter of justice. See, *e.g.*, U.S. Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* 9–15 (2015) (documenting the ways in which the law enforcement in the City of Ferguson prioritize generating revenue to meet budgetary needs), https://bit.ly/1lV31kb, Alicia Bannon et al., Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 30–31 (2010) (noting ways in which reliance on court fees creates conflicts of interest in courts and probation departments), https://bit.ly/2M5KCOF. In short, a government institution charged with even-handedly applying the law acquires a vested interest on one side of the scale.

C. Forfeiture Laws Have Caused State Agencies To Pursue Assets Of Low-Income Individuals.

Proponents of asset forfeiture view (and viewed) the laws as essential to deter drug trafficking by making the assets of kingpins subject to forfeiture. See, *e.g.*, Stefan D. Casella, United States Attorneys' Bulletin, *Overview of Asset Forfeiture Law in the United States* 8 (Nov. 2007), https://bit.ly/2BFE1Fo; DOJ Review, *supra*, at 1. But this purpose has not panned out in practice.

1. Over time, in no small part due to the perverse budgetary incentives that forfeiture statutes create, law enforcement has shifted its focus from powerful kingpins and crime bosses to less-culpable actors. The Alabama Supreme Court has observed that "forfeiture laws are being used more frequently to punish users like [petitioner, a drug user,] rather than to punish those higher up the drug distribution chain." *Ex parte Kelley*, 766 So. 2d 837, 839 (Ala. 1999) (quoting lower court concurrence). In fact, most forfeitures today involve small dollar amounts — not large stashes of money seized from kingpins. See, *e.g.*, Radley Balko, *Chicago civil asset forfeiture hits poor people the hardest*, Washington Post (June 13, 2017) ("[R]oughly 11,000 seizures in Cook County over the five-year period were for amounts lower than $1,000. Nearly 1,500 were for amounts under $100."), https://wapo.st/2PFgyvz; Utah Commission on Criminal and Juvenile Justice, *2017 Utah Annual Forfeiture Report* 2 (listing median cash value of property seized in Utah in 2017 as under $1,100), https://bit.ly/2wNeYzL.

States' focus on seizing small sums of money from less-culpable individuals also results from the fact that forfeiture laws generally permit enforcement agencies to retain seized cash while requiring them to destroy seized drugs. This feature encourages agencies to target low-level operatives, and to seize cash after completion of a drug sale, rather than targeting drug traffickers or preventing drug sales. *Policing for Profit* at 16 (describing a multiyear investigation that revealed Tennessee police officers focused on westbound lanes where smugglers hauled cash back to Mexico, rather than eastbound lanes, where smugglers transport drugs to the east coast).

2. Worse, the incentive structure created by forfeiture statutes also means that state agencies are targeting individuals with little or no connection to criminal activity in order to fill their coffers rather than to recover the proceeds of crimes. Or, in the words of the Alabama Supreme Court, "state[s] [are] edging ever closer to abusing the forfeiture laws, confiscating individuals' property with no thought or proof of whether the items it is taking are actually the fruits of illegal drug sales or are actually being used to facilitate drug use or distribution." *Kelley*, 766 So. 2d at 839 (quoting lower court concurrence).

Take the example of Consuela, a low-income Philadelphia resident in her mid-sixties, whose niece rented a room in Consuela's home. Rebecca Vallas et al., Center for American Progress, *Forfeiting the American Dream: How Civil Asset Forfeiture Exacerbates Hardship for Low-income Communities and Communities of Color* 10 (April 2016) ("Forfeiting the American Dream"), https://ampr.gs/2OZeEFK. Local law enforcement searched Consuela's home while she was away, on suspicion that her niece's

boyfriend (who was arrested during the search) had been involved with drugs. *Id.* Once the boyfriend was released from jail, Consuela told him that he was not allowed in her home and she never had contact with him again. *Id.* Four months later, despite Consuela's lack of knowledge of or relationship to the boyfriend's drug crimes, the Philadelphia District Attorney initiated an action to seize and forfeit Consuela's home. *Id.* Unable to afford an attorney, but lucky enough to secure free legal help from a university clinic, Consuela challenged the forfeiture in court. *Id.* With legal assistance, Consuela was able to negotiate a settlement that let her keep her house in exchange for banning her niece and her boyfriend from the home forever. *Id.*

Of course, Consuela is not unique, but few of those who come to be in the cross-hairs of enforcement agencies are fortunate enough to secure able legal representation. Even law-enforcement agencies themselves have voiced concern about whether seizure and forfeiture activities actually further investigations, rather than target non-culpable individuals in the pursuit of items of value. See, *e.g.*, DOJ Review, *supra*, at 16, 20–30 (finding that the DOJ could but does not measure how its asset seizure and forfeiture activities advance criminal investigations, and reviewing a sample of seizures that "provided evidence that many of the DEA's interdiction seizures may not advance or relate to criminal investigations").

3. The enforcement trend of seizing the assets of those with little to no connection to criminal activity disproportionately affects low-income communities and communities of color. See, *e.g.*, *Forfeiting the American Dream*, *supra*, at 6. Often disconnected from

the financial mainstream and more likely to carry sums of cash, low-income individuals and people of color often have their assets seized during routine traffic stops. See *id.*; see also American Civil Liberties Union, *Civil Asset Forfeiture, Profiting from California's Most Vulnerable* 8 (2016), https://bit.ly/2PB1QWd. For example, the Los Angeles Sherriff's Department seized $10,000 a taco truck owner was carrying from his lawful taco business after a police dog smelled the money. *Profiting from California's Most Vulnerable*, *supra*, at 8. And police in San Diego, California, seized $18,000 from another individual who had been pulled over in a traffic stop, despite having paperwork demonstrating that the money was lawfully associated with her janitorial company. *Id.* at 7.

D. Forfeiture Statutes Afford Meager Procedural Protections.

Situations like these occur not just because of the incentive structures that forfeiture statutes create, but also because they afford meager protections to the property owner whose assets are seized. Those inadequate protections exacerbate the outsized impact that the forfeiture statutes have on "the poor and other groups least able to defend their interests in forfeiture proceedings." *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring in denial of writ of cert.).

1. To begin, in most states, enforcement agencies need not convict — or even charge — an individual with a crime before seizing the individual's assets. *Policing for Profit*, *supra*, at 17, 45–149; Southern Poverty Law Center, *Forfeiting Your Rights, How Alabama's Profit-Driven Civil Asset Forfeiture Scheme*

Undercuts Due Process and Property Rights 16–17 (2018), https://bit.ly/2PKbcz3; see, *e.g.*, Miss. Code Ann. § 41-29-179(2) (requiring no conviction before forfeiture); Mich. Comp. Laws § 333.7521(2) (same); Mass. Gen. Laws ch. 94C, § 47 (same); Iowa Code § 809A.13(7) (same). Contra, Minn. Stat. § 609.531, subd. 6a(b), (d) (requiring criminal conviction prior to forfeiture); Mont. Code Ann. § 44-12-207(1) (same).

2. And the government's standard of proof is more relaxed than in the criminal context. Many states only require the government to demonstrate its case by a preponderance of the evidence. See, *e.g.*, La. Stat. Ann. § 40:2612(G); Me. Stat. tit. 15, § 5822(3); Haw. Rev. Stat. § 712A-12(8); Ga. Code. Ann. § 9-16-17(a)(1); see also *Policing for Profit*, *supra*, Appendix B (collecting state statutes). Some state laws set the standard of proof even lower — at probable cause. *E.g.*, Mass. Gen. Laws ch. 94C, § 47(d); N.D. Cent. Code §§ 19-03.1-36.6, 19-03.1-36.2; R.I. Gen. Laws § 21-28-5.04.2(p); see also *Pope* v. *Gordon*, 369 S.C. 469, 474 (S.C. 2006) (government required to show probable cause).

Once the government meets the relaxed standard set by these statutes, it gets tougher still for the property owner. Many state laws require someone who wishes to recover his or her property to face the almost insurmountable hurdle of affirmatively proving a negative: that he or she had no relationship to the supposed criminal act giving rise to the forfeiture. *Policing for Profit*, *supra*, at 20 (in 2015, laws in 35 states placed the burden of proof on an innocent owner to demonstrate he or she had no relationship to the underlying crime); see, *e.g.*, N.D. Cent. Code §§ 19-03.1-36.6, 19-03.1-36.2 (once probable cause is proven, shifting the burden to the

claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture).

3. The deck can be further stacked against the owners of property targeted in forfeiture proceedings. Some states allow the government to rely on hearsay evidence in the probable-cause phase, but require claimants to comply with the rules of evidence when rebutting the government's proof. 725 Ill. Comp. Stat. 150/9(B) (2018); see also *Commonwealth* v. *One 2004 Audi Sedan Auto.*, 456 Mass. 34, 38 (2010) (government need not rely on "admissible evidence" in showing probable cause to seek asset forfeiture); *State* v. *1981 Cadillac Deville*, 684 So. 2d 1123, 1124 (La. Ct. App. 1981) ("[P]robable cause may be established by . . . hearsay evidence.").

And few states offer counsel in forfeiture proceedings. *Forfeiting the American Dream*, *supra*, at 12; see also DOJ Review, *supra*, at 28 n.49 ("Both the House of Representatives and the Senate have expressed concern with the potential cost of legal representation when an individual contests a seizure. Recent legislative proposals have sought to guarantee legal counsel to those financially unable to obtain representation when contesting an administrative forfeiture."). That is the case even though forfeiture proceedings are widely recognized as punitive. *Austin* v. *U.S.*, 509 U.S. 602, 618–19 (1993) (noting "the historical understanding of forfeiture as punishment").

4. Finally, before a claimant can even get to court to challenge the forfeiture of an asset, some states require the payment of significant fees. See, *e.g.*, Haw. Rev. Stat. § 712A-10(9); R.I. Gen. Laws § 21-28-5.04.2(h)(4), (7); Tenn. Code Ann. § 40-33-206(b)(1);

2018 Ill. Legis. Serv. P.A. 100-699 (S.B. 564) (WEST). In Illinois, claimants are required to pay a bond for the greater of $100 or 10% of the property's value — an amount that is not completely recoverable even if the claimant wins. 2018 Ill. Legis. Serv. P.A. 100-699 (S.B. 564) (WEST) (requiring the return of only 90% of claimant's bond if "none of the seized property is forfeited"). If the claimant loses, he or she is further required to pay the cost of the forfeiture proceedings as well as the government's legal costs. *Id.* Such fees, when assessed on low-income individuals, can create an insurmountable cycle of debt. See *Criminal Justice Debt: A Barrier to Reentry*, *supra*, at 13–18.

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In short, even though forfeiture is viewed, appropriately, as a punitive measure, statutes authorizing forfeiture have imposed only limited procedural burdens upon state officers who wish to seize property. Moreover, these factors most sharply affect the ability of low-income Americans to challenge seizures. Similarly, language barriers, lack of formal education, lack of access to legal assistance, among other things, make it "less likely [for racial minorities] to successfully contest forfeiture after the property has been seized." Mary Murphy, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 Tex. J. C.L. & C.R. 77, 93 (2010). And even where property owners have the ability to challenge a forfeiture, law enforcement's focus, described above, on forfeiting relatively small sums of cash means that the costs of mounting a challenge will often exceed the amount that has been seized. See Office of the Auditor, State of Hawai'i, *Audit of the Department of the Attorney General's Asset Forfeiture Program* 4 (June 2018) (about 85% of Hawai'i's administrative forfeiture

cases were uncontested between 2006 and 2015), https://bit.ly/2M5dMxb.

E. The Court Should Hold That The Excessive Fines Clause Is Incorporated Into The Fourteenth Amendment.

The breadth of the property rights that may be seized through forfeiture, the incentives for abuse that modern statutes create, and the few procedural protections they afford for individual property rights all suggest that the Court should hold that the Excessive Fines Clause, and its protections against excessive and unfair forfeitures, is incorporated.

1. The protections of the Excessive Fines Clause apply to federal forfeitures, and these protections curb disproportionate takings. See, *e.g.*, *von Hofe* v. *United States*, 492 F.3d 175, 186 (2d Cir. 2007) (finding forfeiture of wife's interest in home unconstitutional where record was devoid of any evidence linking wife to husband's marijuana-related crimes in the home); *United States* v. *$49,766.29 U.S. Currency*, 2003 WL 21383277, at *6 (W.D.N.Y. Jan. 22, 2003) (finding that "there are unresolved issues of material fact as to whether forfeiture of the entire $49,766 would be grossly disproportionate to Nelson's offense" and denying summary judgment on Excessive Fines Clause claim).

Similarly, some states — although not Indiana, among others, as this case shows — apply the Eighth Amendment's Excessive Fines Clause to state asset forfeitures, and in doing so they prohibit excessive government takings. See, *e.g.*, *In re Forfeiture of 1990 Chevrolet Blazer*, 684 So. 2d 197, 198 (Fla. Dist. Ct. App. 1996) (holding forfeiture of vehicle excessive under the Clause where the "value of the [automobile]

was double the amount of the fine that could be imposed for the [underlying drug offense to which owner] admitted"); *Kelley*, 766 So. 2d at 840 (finding forfeiture of car worth six times the maximum fine the legislature allowed to impose for the underlying drug crime "grossly disproportional to the gravity of [the] offense" and "bear[ing] no articulable correlation to any injury suffered by the state"); *State* v. *Boyd*, 618 N.W.2d 251, 252 (Wis. Ct. App. 2000) (affirming order holding that if the entire $28,000 value of Boyd's vehicle were forfeited, the forfeiture would violate the United States Constitution's prohibition of excessive fines).

2. The Court should hold that the Eighth Amendment's limitations curbing excessive federal forfeitures apply to the states as well. To begin, the Court has previously implied that all three clauses of the Eighth Amendment, including the Excessive Fines Clause, are incorporated. *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014) ("The Eighth Amendment provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' The Fourteenth Amendment applies those restrictions to the States."). This makes sense. All three clauses work harmoniously to "place[] limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989).

3. Beyond that, all relevant factors weigh in favor of incorporation. As Petitioner persuasively explains, the original understanding counsels in favor of

incorporation. So does the modern experience with civil asset forfeiture.

The Excessive Fines Clause mirrors a provision in the 1689 English Bill of Rights that prohibited the imposition of "excessive fines." *Browning-Ferris*, 492 U.S. at 267. The English provision addressed fines levied by the Stuart Kings and their judges against political rivals — fines so excessive that "opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Id.* Our own founders "were aware of and took account of" those abuses, and designed the Excessive Fines Clause to "limit[] the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Id.* The incentives that modern forfeiture statutes create and the lower procedural protections they provide both generate considerable potential for abuse of the same sort that led the Founders to adopt the Excessive Fines Clause in the first place.

As James Madison wrote in 1792, "Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." *Policing for Profit*, *supra*, at 44 & n.167. The Constitution contains numerous express protections for individual property rights. Consider the Due Process Clauses themselves; they expressly protect "property" from incursion by the federal government and the states without due process. Consider also the Contracts Clause, which originally applied to the states and was adopted for a "great and useful purpose" — to "maintain the integrity of contracts, and to secure their faithful execution throughout this Union" by prohibiting interference by

the state governments. *Bronson* v. *Kinzie*, 42 U.S. 311, 318 (1843). Consider, too, the Fifth Amendment's Takings Clause, designed to "prevent[] the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation,'" *Landgraf* v. *USI Film Prod.*, 511 U.S. 244, 266 (1994), and incorporated against the states not long after the adoption of the Fourteenth Amendment, see *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 241 (1897). All these limitations on government authority restrict state power to impinge upon property rights.

The Excessive Fines Clause is of a piece with these protections. The prohibition on excessive fines is "fundamental to our scheme of ordered liberty and system of justice," *McDonald*, 561 U.S. at 764 (emphasis omitted), for no government, state or federal, has a legitimate interest in imposing fines that are *excessive*.

Applying the Eighth Amendment's limitations to the states is the proper way to protect people from the improper seizures of property under the guise of law enforcement. As shown above, these seizures have only become more abusive in the wake of modern forfeiture statutes that have created distorted profit incentives for state officials and a stacked deck against property owners in court. And all that ostensibly in the name of pursuing kingpins in the "War on Drugs," but in reality profoundly affecting persons of modest means and people of color.

CONCLUSION

The Court should reverse the Indiana Supreme Court and hold that the Excessive Fines Clause is incorporated against the states.

Respectfully submitted,

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APPENDIX

Amici consist of the following organizations:

1. **The Drug Policy Alliance** ("DPA") is a non-profit organization seeking to advance policies and attitudes that best reduce the harms of both drug use and drug prohibition. DPA is composed of and supported by a broad coalition of individuals who share the belief that the war on drugs has failed. As part of its mission, DPA is interested in curtailing the practice of civil asset forfeiture, which (as detailed above) is a drug enforcement tool that is used disproportionately to harm the poor and minorities.

2. **The National Association for the Advancement of Colored People** ("NAACP"), founded in 1909, is the country's largest and oldest civil rights organization. The mission of the NAACP is to ensure the equality of political, social, and economic rights of all persons, and to eliminate racial hatred and racial discrimination. Throughout its history, the NAACP has used the legal process to champion equality and justice for all persons. Since its inception, the NAACP has advocated for fair criminal justice laws and procedures to protect communities of color and other vulnerable communities. In 2014, the NAACP published a report entitled Born Suspect, which provides important research and information regarding how the criminal justice system in our nation disproportionately harms African Americans and other communities of color. The NAACP advocates for fairness in policing procedures. The NAACP passed a resolution

calling for the termination of programs which condone and even reward civil asset forfeiture, including the so-called "Equitable Sharing Program" at the federal level which allows state and local law enforcement to seize property from individuals without proving criminal wrongdoing and then refer this property to federal authorities to pursue forfeiture.

3. **Americans for Prosperity** exists to recruit, educate, and mobilize citizens in support of the policies and goals of a free society at the local, state, and federal level, helping every American live their dream — especially the least fortunate.

4. **The Brennan Center for Justice at NYU School of Law** ("the Brennan Center") is a non-profit, nonpartisan public policy and law institute that seeks to secure our nation's promise of "equal justice for all" by creating a rational, effective, and fair criminal justice system.[3] The Brennan Center advocates for reshaping public policies that undermine this vision, including the imposition of criminal justice debt and related practices.

5. **FreedomWorks Foundation** trains and educates activists on the principles of smaller government, lower taxes, free markets, personal liberty and the rule of law.

6. **The Law Enforcement Action Partnership** is a 501(c)(3) nonprofit of police, judges, prosecutors, corrections officials, and other law enforcement professionals who seek to make

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[3] This brief does not purport to represent the views, if any, that the N.Y.U. School of Law may have.

communities safer by focusing law enforcement resources on the greatest threats to public safety, promoting alternatives to arrest and incarceration, addressing the root causes of crime, and working toward healing police-community relations.

7. **The Independence Institute** is a non-profit Colorado public policy research organization founded in 1985 on the eternal truths of the Declaration of Independence. The Institute is the second-oldest state think tank. The Institute has written and testified extensively on forfeiture abuse and forfeiture reform at the state, local, and congressional levels. The Institute has participated in many constitutional cases, and its amicus briefs in *District of Columbia* v. *Heller* and *McDonald* v. *Chicago* were cited in the opinions of Justices Alito, Breyer, and Stevens (under the name of lead amicus ILEETA, International Law Enforcement Educators and Trainers Association). The research of the Institute's Senior Fellow in Constitutional Jurisprudence, Robert G. Natelson, was cited by Justice Thomas in *Adoptive Couple* v. *Baby Girl* (concurring), and *Upstate Citizens for Equality* v. *United States* (dissenting from denial of certiorari); Justices Scalia, Thomas, and Alito, and Chief Justice Roberts in *N.L.R.B.* v. *Noel Canning* (concurring) and *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n* (dissenting); Justices Alito and Scalia in *Town of Greece* v. *Galloway* (concurring); Justice Kennedy in *Arizona* v. *Tribal Council of Arizona* (concurring in part

and dissenting in part); and by then-Judge Gorsuch in *Kerr* v. *Hickenlooper* (dissenting).

8. **Libertas Institute** is a free market think tank that collaborates with a diverse group of organizations and allies to create a freer Utah, effecting change through legal research, public advocacy and advertising, lawsuits against government, events, publications, and more.

9. **The Drug Policy Forum of Hawai'i** ("DPFHI") is a non-profit organization founded in 1993 to educate policymakers and the public about effective ways of addressing drug issues in Hawai'i with sensible and humane policies that reduce harm, expand treatment options, and adopt evidence-based practices while optimizing the use of scarce resources. The Drug Policy Forum of Hawai'i envisions a just society where drug laws are grounded in science, compassion, and public health, and where criminalization is reserved for those who pose a genuine danger to public safety. DPFHI believes that civil asset forfeiture is a blunt law enforcement tool, whose modern origins are rooted in the misguided "War on Drugs," which spread to the states, including Hawai'i, and has resulted in the targeting of the poor and communities of color while undermining fundamental notions of due process.

10. **The Colorado Criminal Defense Bar** ("CCDB") is an organization of approximately 1,000 attorneys and it is one of the largest bar associations in Colorado. The CCDB is dedicated to protecting the rights of the accused. We provide training and support to the criminal defense community in an effort to

promote zealous advocacy for our clients at every stage of representation.

11. **Alabama Appleseed Center for Law and Justice** ("Alabama Appleseed") is a non-profit, non-partisan 501(c)(3) organization founded in 1999 whose mission is to work to achieve justice and equity for all Alabamians. Alabama Appleseed is a member of the national Appleseed Network, which includes 18 Appleseed Centers across the U.S. and in Mexico City. As part of its Fair Schools, Safe Communities Campaign, Alabama Appleseed has documented how civil asset forfeiture has evolved from a program intended to strip illicit profits from drug kingpins into a revenue-generating scheme for law enforcement that is widely used against people — disproportionately African American — accused of low-level crimes or no crime at all. Alabama Appleseed is working to stop this harmful practice.

12. **The Rio Grande Foundation** ("RGF") is a research institute dedicated to increasing liberty and prosperity for all of New Mexico's citizens. RGF works to inform New Mexicans of the importance of individual freedom, limited government, and economic opportunity. At the very core of individual freedom is individual ownership of property. As such, reform and even repeal of civil asset forfeiture laws nationally and at the state level have been a core interest of our organization. The RGF was part of a bipartisan coalition that successfully advocated for repeal of civil asset forfeiture in New Mexico. Wherever possible the RGF

continues to advocate for similar reforms to be enacted in other states and at the federal level.

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BRIEF *AMICI CURIAE* OF EIGHTH AMENDMENT SCHOLARS IN SUPPORT OF NEITHER PARTY

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BRIEF *AMICI CURIAE* OF EIGHTH AMENDMENT SCHOLARS IN SUPPORT OF NEITHER PARTY

STATEMENT OF INTEREST

Amici curiae John D. Bessler, Beth A. Colgan, and John F. Stinneford are law professors who study and write about the Eighth Amendment.[1]

SUMMARY OF ARGUMENT

In deciding whether the Excessive Fines Clause is incorporated against the States by the Fourteenth Amendment, this Court must also address an essential predicate question: What is the nature of the right that the Excessive Fines Clause guarantees?

This brief provides context for these questions by offering an account of the constitutional and common law history of the Excessive Fines Clause. The Clause derived from English antecedents,[2] and the traditional common law right to freedom from excessive monetary sanctions—recognized in Magna Carta, reaffirmed in the English Bill of Rights of 1689—was widely regarded as a fundamental

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[1] Biographical statements are included in the Appendix. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties consent to the filing of this brief.

[2] The Excessive Fines Clause "was based directly on Art. I, § 9 of the Virginia Declaration of Rights (1776)," *Solem v. Helm*, 463 U.S. 277, 285 n.10 (1983), and its language was drawn "verbatim from the English Bill of Rights of 1689." *United States v. Bajakajian*, 524 U.S. 321, 335 (1998). As a whole, the Eighth Amendment's text differs only in that "shall not be" replaces "ought not to be" in the two earlier documents, and in minor orthographic variations in the English version.

precept of law by the seventeenth and eighteenth centuries. This common law right protected offenders in two core ways. First, it required that the amount of a penalty bear a relationship to the gravity of the offense it was designed to punish.[3] Second, it required that a penalty not exceed an offender's ability to pay it, and permitted an offender to preserve a minimum core level of economic subsistence and security notwithstanding the imposition of punishment. This second principle—sometimes referred to in cases and treatises by a Latin maxim drawn from the language of Magna Carta, "*salvo contenemento*"[4]—also enabled offenders to avoid the severe collateral consequences often associated with oppressive economic penalties, such as imprisonment for nonpayment and the impoverishment of innocent family members.[5]

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[3] This principle has been recognized by this Court, see *Bajakajian*, 524 U.S. at 334, and has also been the subject of substantial scholarly commentary, see, e.g., John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899 (2011) [Stinneford, *Rethinking*]; John D. Bessler, *The Birth of American Law: An Italian Philosopher and the American Revolution* 142-224, 368-75 (2014).

[4] See Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 836-38, 853-72 (2013) (discussing this concept).

[5] See, e.g., 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 490 (1819 ed.); *accord* William Eden (Baron Auckland), *Principles of Penal Law* 73 (3d ed. 1775); 4 William Blackstone, *Commentaries on the Laws of England* *371-73 (1769) [Blackstone, *Commentaries*]; see *infra* I.A-B.

In America, as in England, these fundamental principles shaped early understandings of what it meant to enjoy the right to freedom from "excessive fines." This is demonstrated by colonial declarations of rights, early decisional law, the American editions of leading English treatises, and the influential works of nineteenth century American commentators.[6] Moreover, there is substantial historical evidence suggesting that in the American colonies and the early states, the term "fines" was broadly understood to encompass a variety of forms of sanctions—including monetary payments, payments in kind, payments to a sovereign, and payments to victims and nongovernmental entities—and not artificially constrained by a proceeding's label as "civil" or "criminal."[7]

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[6] See, e.g., Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 328 (1868) ("A fine should have some reference to the party's ability to pay it.") [Cooley, *Constitutional Limitations*]; Benjamin L. Oliver, *The Rights of an American Citizen* 185 (1832) (stating that, when fines are assessed, "[a] man's farm or stock in trade, ought never to be made a sacrifice, to the ruin of himself and the distress of his family"); see *infra* II.A.

[7] Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 300-08 (2014) [Colgan, *Reviving*]; see *infra* II.B.

ARGUMENT

I. THE RIGHT TO FREEDOM FROM EXCESSIVE FINES HAS DEEP HISTORICAL ROOTS

A. Magna Carta Recognized Fundamental Limitations on Monetary Penalties

The history of the right to freedom from excessive monetary sanctions stretches back at least to Magna Carta, the "foundation of our English law heritage." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). The barons who assembled at Runnymede in 1215 and forced King John to agree to Magna Carta "sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 270-71 (1989). Amercements were "the most common criminal sanction in 13th-century England," *id.* at 269, and were a "medieval predecessor[ ] of fines." *Bajakajian*, 524 U.S. at 335.

Chapter 14 of Magna Carta, first codified in statute in 1225, provides in relevant part:

> A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement ["*salvo contenemento suo*"]; (2) and a Merchant likewise, saving to

> him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy.

Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 1, 6-7 (1762 ed.).[8] Chapter 14 limited abuses by, *inter alia*, "requiring that the amount of the amercement be proportioned to the wrong," *Browning-Ferris*, 492 U.S. at 271, and by requiring that an amercement not be so severe as to take an offender's "contenement," "wainage," or "merchandise"—sometimes rendered in modern translations as "livelihood." *Id.*

"[T]o save a man's 'contenement' was to leave him sufficient for the sustenance of himself and those dependent on him." William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 293 (2d ed. 1914). This meant that "[i]n no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him." *Id.* at 287.[9] The effect of Magna Carta's protections for "[m]erchant[s]" and "villain[s]"[10] was similar: By protecting "merchandise" and "wainage," a minimum

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[8] The amercements chapter of Magna Charta, originally numbered as Chapter 20, was renumbered as Chapter 14 in the version codified by statute in 1225.

[9] See also Giles Jacob, *A New Law-Dictionary* (8th ed. 1762) (unpaginated) (defining "contenement" as "that which is necessary for the Support and Maintenance of Men, agreeable to their several Qualities, or States of Life").

[10] A "villain," or "villein," was a type of feudal tenant. See Paul R. Hyams, *King, Lords and Peasants in Medieval England* (1980) [Hyams, *Peasants*].

core level of economic subsistence was assured, despite the imposition of monetary punishment.[11]

The principles set forth in Magna Carta were confirmed and restated numerous times in subsequent legislation during the thirteenth, fourteenth, and fifteenth centuries. See Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300-1629* 10 (1948). "Following Magna Charta a writ to enforce the concept of *salvo contenemnento* developed, fourteenth-century petitions tested it, and other laws confirmed it." Lois G. Schwoerer, *The Declaration of Rights, 1689* 91 (1981) [Schwoerer, *Declaration*]; see also Hyams, *Peasants* 44, 76, 143-44 (impact of poverty as limiting amercements); Thomas Madox, *The History and Antiquities of the Exchequer of the Kings of England* 678 (1711) (similar; noting early cases in which amercements were set such that an offender could "sav[e] the Maintenance of himself, his Wife and Children").

For subsequent generations, Magna Carta "becomes a sacred text, the nearest approach to an irrepealable 'fundamental statute' that England has ever had." 1 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 152 (1895). "In age after age a

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[11] Coke describes wainage as "the contenement or countenance of the villain," Edward Coke, *The Second Part of the Institutes of the Laws of England* 28 (E & R Brooke 1797) (1642), and also suggests (relying on Ranulf de Glanvill's late twelfth-century treatise) that the protections of Chapter 14 were "made in affirmance of the common law[.]" *Id.* at 27.

confirmation of it will be demanded and granted as a remedy for those oppressions from which the realm is suffering[.]" *Id.* Indeed, "[m]ore important than the literal intent of the men of Runnymede is the meaning that future generations were able to read into their words." 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 7 (1971) [Schwartz, *Documentary History*]. In this way, a document that was a product of thirteenth century feudal class struggles could nevertheless come to serve as a "basis for molding the foundations of a Parliamentary monarchy," as a "vehicle to enable the Parliamentary leaders to resist the misdeeds of Stuart Kings four centuries later," and, ultimately, as "the core of the rights of Englishmen asserted by American colonists[.]" *Id.*

B. The English Bill of Rights' Provision that "Excessive Fines" "Ought Not To Be" "Imposed" Was a Reaction to Notorious Seventeenth Century Abuses

The ancient right to freedom from oppressive monetary sanctions was severely tested in the seventeenth century. From the notorious and well-chronicled abuses of that era emerged the English Bill of Rights' provision that "excessive Fines" "ought not to be" "imposed."

1. The Star Chamber

"In the early seventeenth century, the levying of fines became entangled in the constitutional and political struggles between the king and his parliamentary critics." Schwoerer, *Declaration* 91.

When, from 1629 to 1640, Charles I sought to govern without convening Parliament, the absence of Parliamentary appropriations made finding new ways of raising revenue essential. Accordingly, "the King's financial advisers devised" "expedients of a novel kind" "to take advantage of the law's technicalities" to benefit the public fisc. J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* 74 (1971 ed.). The machinery of criminal justice—and the High Court of Star Chamber, in particular[12]—was a useful means to that end.

The Star Chamber "impos[ed] such fines as should supply the king with a considerable revenue, in the absence of parliamentary grants." 4 Henry Walter, *A History of England* 135 (1834); see Roger Lockyer, *The Early Stuarts: A Political History of England, 1603-1642* 260 (1989) (observing that "the impetus behind [a] spate of prosecutions in the 1630s was financial").

"The proponents of the common law sought to apply the principle of Magna Charta to fines imposed by the court[.]" Schwoerer, *Declaration* 91. A 1615 decision reported by Coke—*Godfrey's Case*, 11 Co. Rep. 42a, 43a-44a, 77 Eng. Rep. 1199, 1202 (K.B. 1615)—had held that the "reasonableness of [a] Fine shall be adjudged by the Justices; and if it appears to them to be to be excessive, it is against Law, and shall not bind; for *excessus in re qualibet jure*

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[12] As a prerogative court, the Star Chamber was considerably less independent from the Crown than the common law courts were.

reprobatur communi"[13] and that "[a]n excessive Fine at the Will of the Lord, shall be said oppression of the people."

Yet the Star Chamber disregarded such limitations and "imposed heavy fines"—particularly "on the king's enemies[.]" Schwoerer, *Declaration* 91. William Hudson's *Treatise on The Court of Star Chamber*, written circa 1635, observes that in earlier years, the fines imposed by that court were "trenched not to the destruction of the offender's estate and utter ruin of him and his posterity as now they do, but to his correction and amendment, the clergy's song being of mercy[.]" William Hudson, *A Treatise on The Court of Star Chamber* (1635), reprinted in 2 Francis Hargrave, *Collectanea Juridica* (1791).

Similarly, a tract published in 1637 contrasted the contemporary practices of the Star Chamber with earlier practices under John Whitgift (Archbishop of Canterbury from 1583 until 1604), noting that "Archbishop Whitgift did constantly in this Court maintain the liberty of the *Free Charter* that none ought to be fined but *salvo contenimento*. He seldom gave any sentence but therein did mitigate in something the acrimony of those that spake before him[.]" *A Discourse Concerning the High Court of Star Chamber* (1637), reprinted in *The Star Chamber* 4, 10 (John Southerden Burn ed. 1870).

During an impeachment trial in the Irish House of Lords in March 1641, one advocate declared: "[T]hough Magna Charta be so sacred for Antiquity; though its Confirmation be strengthened by Oath,

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[13] Lit. "Excess in any thing is reprehended by common law." 2 John Bouvier, *A Law Dictionary* 179 (15th ed. 1890).

though it be the proper Dictionary that expounds *meum* and *tuum*,[14] and assigns every Subject his Birthright, it only survives in the Rolls, but is miserably rent and torn in the Practice. These Words, *Salvo Contenemento*, live in the Rolls, but they are dead in the Star-Chamber." *Impeachment of Sir Richard Bolton*, 4 How. St. Tr. 51, 53 (Parl. (Ire.) 1641) (argument).

The Star Chamber would be remembered as a cautionary tale of the danger that inheres when legitimate penological interests are warped and corrupted by financial self-interest: "[T]he strong interest of the court in these fines ... had a tendency to aggravate the punishment[.]" 2 Henry Hallam, *The Constitutional History of England From the Accession of Henry VII to the Death of George II* 49 (2d. ed. 1829). As Hallam put it, "those who inflicted the punishment reaped the gain, and sat, like famished birds of prey, with keen eyes and bended talons, eager to supply for a moment, by some wretch's ruin, the craving emptiness of the exchequer"—"regardless of the provision of the Great Charter, that no man shall be amerced even to the full extent of his means[.]" *Id.* at 47.

In July 1641, the Star Chamber's myriad abuses "brought that institution to an end at the hands of the Long Parliament[.]" *Jones v. SEC*, 298 U.S. 1, 28 (1936). But the Star Chamber's final years would live on in the legal and popular imagination as a uniquely unconstitutional moment—a clarifying, galvanizing, paradigm example of what no court should ever do.

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[14] Lit. "mine" and "yours."

2. The Bill of Rights of 1689

The right to freedom from excessive fines was again tested in the years leading up to the Glorious Revolution, when further abuses in the assessment of fines took place. See Schwoerer, *Declaration* 91. In the decades following the Star Chamber's abolition, some common law courts had recognized the applicability of Magna Carta's amercement provisions to fines imposed by courts. See, e.g., *Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (C.P. 1677) (North, C.J.) ("In cases of fines for criminal matters, a man is to be fined by Magna Charta with a *salvo contenemento suo*; and no fine is to be imposed greater than he is able to pay[.]").

But other judges—including the infamous George Jeffreys—held "that Magna Carta did not apply to fines for offenses against the Crown." *Browning-Ferris*, 492 U.S. at 290 (O'Connor, J., concurring in part and dissenting in part). For example, in *John Hampden's Case*, 9 How. St. Tr. 1054 (K.B. 1684), Jeffreys flatly rejected the defendant's argument that, per Magna Carta, "there should be a Salvo Contenemento in all fines[.]" *Id.* at 1124. As a purely historical and technical matter, the position Jeffreys advanced in *John Hampden's Case* was not wholly unsupportable. Historically, the terms "fines" and "amercements" had indeed referred to different forms of sanctions. See, e.g., John Fox, *Contempt of Court* 118-19 (1927) (discussing this distinction). But though fines and amercements had distinct historical antecedents, they served fundamentally similar purposes—and, by the seventeenth and eighteenth centuries, the terms were often used interchangeably in common parlance. See *Browning-Ferris*, 492 U.S.

at 290-91 (O'Connor, J., concurring in part and dissenting in part); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1264 (1987); 4 Blackstone, *Commentaries* *371-73 (identifying Magna Carta's amercement provisions as regulating "[t]he reasonableness of fines in criminal cases").

By applying an unduly narrow, technical reading to Magna Carta in *John Hampden's Case*, Jeffreys had effectively allowed an exception to swallow the rule—and violated the very principles for which Magna Carta had come to be seen to stand. See, e.g., 4 John Campbell, *Lives of the Lord Chancellors and Keepers of the Great Seal of England* 412 (1847) (characterizing Jeffreys' rejection of the proportionality and *salvo contenemento* principles for judge-imposed fines as having "pervert[ed] the law"; noting that John Hampden, a "young gentleman" who "was only heir apparent to a moderate estate, and not in possession of any property," "was sentenced to pay a fine of 40,000*l.*" "for a trifling misdemeanour").

Moreover, decisions such as *John Hampden's Case* had disastrous practical consequences because "English courts during the reigns of Charles II and James II took advantage of their newly acquired power and imposed ruinous fines on wrongdoers and critics of the Crown." *Browning-Ferris*, 492 U.S. at 290 (O'Connor, J., concurring in part and dissenting in part). By the mid-1680s, "the use of fines 'became even more excessive and partisan,' and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Browning-Ferris*, 492 U.S. at 267 (quotation omitted).

Initial attempts at Parliamentary reform had been unavailing. In 1680, a "Bill for the relief of the Subject against arbitrary Fines" was introduced in the House of Commons. See 8 *Debates of the House of Commons: From the Year 1667 to the Year 1694* 226 (Anchitell Grey ed. 1763). During the debate on the bill, one member observed that "[t]he Fines imposed by *Magna Charta*, and at Common Law, are with a *salvo contenemento*." *Id.* at 226. Another member recalled a case in which a man "was fined a thousand Marks, and was not worth a thousand Shillings," and suggested that "[w]hen the Judges become as great Malefactors as other men, there must be some remedy." *Id.* at 227. He continued, "[i]f the Judges had fined men according to *Magna Charta*, with *salvo contenemento*, there had been no need of this Bill." *Id.* Another member emphasized the importance of "know[ing] the ability of the Person" subjected to fines and observed, "[w]e have had excessive Fines imposed by the Judges." *Id.* at 228.

David Hume, writing in the 18th century, described the abusive nature of the penalties imposed during the 1680s. In one case in 1682, "enormous damages to the amount of 100,000 pounds were decreed." 8 David Hume, *The History of England from the Invasion of Julius Caesar to the Revolution in 1688* 178 (1782). This, Hume explained, was unlawful: "By the law of England, ratified in the great charter, no fines or damages ought to extend to the total ruin of a criminal." *Id.*

A tract published in 1689 observed that "severe fines" had been imposed, and suggested that "the generality of people ... did much complain" and some had "groaned under extravagant Summs, imposed contrary to *Magna Charta*'s *salvo contenimento*, *i.e.*,

saving to them their livelihoods[.]" Anon., *A Letter to a Gentleman at Brussels, Containing an Account of the Causes of the Peoples Revolt from the Crown* 6-7 (1689).

The "conflict between Parliament and the Crown culminat[ed] in the Glorious Revolution of 1688 and the English Bill of Rights of 1689." *Powell v. McCormack*, 395 U.S. 486, 502 (1969). "After James II fled England ... the House of Commons, in an attempt to end the crisis precipitated by the vacation of the throne, appointed a committee to draft articles concerning essential laws and liberties that would be presented to William of Orange." *Browning-Ferris*, 492 U.S. at 290-91 (O'Connor, J., concurring in part and dissenting in part).

The Declaration of Rights of 1688 was "[a] distinct and solemn assertion of the fundamental principles of the constitution and of the ancient franchises of the English nation[.]" Thomas Pitt Taswell-Langmead, *English Constitutional History: From the Teutonic Conquest to the Present Time* 501 (10th ed., 1946). The document included "a recital of all the illegal and arbitrary acts committed by James II" and "an emphatic assertion, nearly following the words of the previous recital, that all such enumerated acts are illegal[.]" *Id.* Having recited, *inter alia*, that "excessive fines have been imposed," the Declaration provides "[t]hat excessive Baile ought not to be required, nor excessive Fines imposed, nor cruell and unusuall Punishments inflicted." Decl. of Rights of 1688. Shortly thereafter, Parliament enacted the Declaration by statute as the Bill of Rights of 1689, further entrenching a set of "undoubted rights and liberties[.]" 1 Wm. & Mary, 2d

Sess., ch. 2, 9 Stat. at Large 67, 69 (1764 ed.).[15] Although the Glorious Revolution represented a period of significant constitutional change, Parliamentary reformers characterized much of their work as restoring ancient rights and privileges. See, e.g., John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* 99-103 (2005).

Two leading cases, decided around the time the English Bill of Rights was framed, illustrate how that document's provision that "excessive fines" "ought not to be" "imposed" was understood at the time of its enactment. First, scholars and members of this Court have suggested that the highly publicized trial and punishment of the Anglican cleric and perjurer Titus Oates[16] may help to illuminate contemporary understandings of the protections set forth in the English Bill of Rights. See, e.g.,

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[15] The events associated with the Glorious Revolution in Scotland are also instructive. When, in April 1689, the Convention of Estates of Scotland voted to remove King James from the throne of Scotland, it declared that he had "Invade[d] the Fundamental Constitution of this Kingdom, and Altered it from a Legal Limited Monarchy, to an Arbitrary Despotick Power" by, among other things, "imposing Exorbitant Fines, to the Value of the Parties Estates, extracting extravagant Bail; and disposing Fines and Forfeitures before any Process or Conviction." *The Declaration of the Estates of the Kingdom of Scotland* 1-2 (1689). Accordingly, it was declared "[t]hat the imposing of extraordinary Fines, the exacting of exorbitant Bail, and the disposing of Fines and Forfeitures, before Sentence, are contrary to Law." *Id.* at 4. See also Claim of Right Act 1689, Wm. & Mary c. 28 (Scot.).

[16] See John H. Langbein, *The Origins of Adversary Criminal Trial* 69-73 (2003) (discussing Oates' perjury and the notorious "Popish Plot") [Langbein, *Origins*].

Harmelin v. Michigan, 501 U.S. 957, 969-70 (1991) (plurality); Stinneford, *Rethinking* 932-38.

In 1685, Judge Jeffreys and his colleagues on the King's Bench had sentenced Oates to a fine of 2,000 marks, life imprisonment, whippings, pilloring, and defrockment. *Id.* at 933 (quoting *Second Trial of Titus Oates*, 10 How. St. Tr. 1227, 1315-17 (K.B. 1685)). "[R]epresentatives from the House of Commons asserted that the House had Oates's case in mind when it drafted the Bill of Rights[.]" *Id.* at 933 (citing 10 H.C. Jour. 247 (1689)). In 1689, Oates challenged his punishments as cruel and illegal, and his fine as excessive. *Id.* In a writ of error to the House of Lords filed on Oates' behalf, the excessiveness of the fine imposed on Oates was characterized as follows:

> *4. Exception.* Fined 1,000 marks in each judgment, and committed in execution for the fines aforesaid; which fines are excessive, twice as much as the Defendant was worth, and therefore against Magna Charta, by which all fines ought to be with a *salvo contenimento*.

Petition of Titus Oates, *Rex v. Oates*, reprinted in 1 *The Manuscripts of the House of Lords, 1689-1690* 81 (1889 ed.).

Oates' petition was rejected by the House of Lords by a vote of 35 to 22, *id.* at 80, but several members dissented on the ground that the sentence was "contrary to the declaration ... that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." 10 How. St. Tr. at 1325. The House of Commons aligned itself with the dissenting Lords:

"On the 2d of July, A bill was brought into the House of Commons to reverse the two judgments against Oates, it was passed and carried up to the Lords on the 6th[.]" *Id.* at 1329. Oates was pardoned and released from prison. Langbein, *Origins* 72.

A second late seventeenth century decision—*The Case of William Earl of Devonshire*, 11 How. St. Tr. 1353 (Parl. 1689)—further clarifies the sort of factors that could make a fine excessive. See, e.g., *Weems v. United States*, 217 U.S. 349, 375-76 (1910) (discussing the case). The petitioner, Lord Devonshire, "was fined £30,000 for an assault and battery[.]" *Id.* at 376. "[T]he House of Lords, in reviewing the case, took the opinion of the law Lords, and decided that the fine 'was excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land.'" *Id.* (quotation omitted). The case was decided just months after the English Bill of Rights had been enacted.

In *Bajakajian*, this Court suggested that the unlawful nature of the fines imposed in cases such as *Devonshire* was "described contemporaneously only in the most general terms." 524 U.S. at 335. But although the *opinion* issued in *Devonshire* did not specify exactly what was meant by "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land," the *argument* that Devonshire's advocate, Henry Booth (Lord

Delamere),[17] presented on Devonshire's behalf clarifies the grounds on which the fine was perceived to be unlawful. See *The Works of the Right Honourable Henry late L. Delamer[e], and Earl of Warrington* 563-82 (1694).[18]

In making the case for "[t]he Excessiveness of the Fine," *id.* at 565, Delamere began by invoking the nation's experience under the Star Chamber: "The Court of *Starchamber* was taken away, because of the *unmeasurable Fines* which it impos'd, which alone was a plain and direct prohibition for any other court to do the like, for otherwise the Mischief remain'd[.]" *Id.* at 574. He observed that "those great *Fines*, imposed in that Court, were inconsistent with the Law of *England*, which is a *Law of Mercy*, and concludes every *Fine* which is left at discretion, with *Salvo Contenimento*." *Id.* "If the Fines imposed in the *Starchamber* were an *intolerable Burden to the Subject, and the means to introduce an Arbitrary Power and Government*, as [the statute abolishing the Star Chamber] recites, the like proceeding in the *King's Bench* can be no less grievous, and must produce the same Evil." *Id.* at 574-75. "Laws that are grounded upon the *ancient Principles of the*

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[17] Delamere served alongside Devonshire on the "rights committee" in the House of Lords, which played an important role in drafting and revising the English Declaration of Rights. Schwoerer, *Declaration* 237-41, 306-07. John Hampden—whose argument that Magna Carta applied to fines had been rejected by Judge Jeffreys in 1684—served on a similar committee in the House of Commons. *Id.* at 91.

[18] See also 11 How. St. Tr. at 1353-66 (reproducing Delamere's argument to the Lords in this "remarkable Case").

Government cannot cease, because the Reason of them will ever continue[.]" *Id.* at 575.

Magna Carta's provisions, Delamere explained, served a critical purpose: "[T]he Judges cannot impose a greater Fine than what the Party may be capable of paying immediately into Court: but if the Judges may commit the Party to Prison till the Fine be paid, and withal set so great a Fine as is impossible for the Party to pay into Court, then it will depend upon the Judges pleasure, whether he shall ever have his *Liberty*, because the *Fine* may be such as he shall never be able to pay: And thus every Man's Liberty is wrested out of the dispose of the *Law*, and is stuck under the *Girdle* of the Judges." *Id.* at 576-77.

Delamere also alluded to the broader societal and dignitary interests that were at play: "Because the *Nation* has an *Interest* in the Person of every particular Subject, for every Man, either one way or other, is useful and serviceable in his Generation, but by these *intolerable Fines* the *Nation* will frequently lose a Member, and the Person that is Fin'd shall not only be disabled from doing his Part in the Common-wealth, but also he and his *Family* will become a *Burden* to the Land, especially if he be a man of no great Estate, for the excessive Charge that attends a Confinement will quickly consume all that he has, and then he and his *Family* must live

upon *Charity*.[19] And thus the poor man will be doubly punish'd, first, to wear out his days in *perpetual Imprisonment*; and secondly, to see Himself and Family brought to a Morsel of Bread." *Id.* at 577.[20]

The Lords agreed with Delamere, and held the £30,000 fine to be "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land[.]" 11 How. St. Tr. at 1372. Together, the two famous cases of *Oates* and *Devonshire* shed considerable light on the ancient principles that the English Bill of Rights' proscription of "excessive fines" was thought to have reaffirmed.

Following the Bill of Rights, the right to freedom from excessive fines was settled law. Consider, for example, the description of the rules governing monetary punishments set forth in the noted jurist Sollom Emlyn's preface to the 1730 edition of *State*

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[19] Cf. Cesare Beccaria, *On Crimes and Punishments and Other Writings* 53 (Richard Bellamy ed., Richard Davies trans., 1995) (1764) (observing that "fines ... take bread from the innocent when taking it from the villains"); Walter J. Baldwin, *Punishment Without Crime; or Imprisonment for Debt* 44 (1813) ("it is the spirit of the Constitution not to punish 'fault,' or even 'crime' itself, but 'according to its degree, or in proportion to its heinousness' and therefore, as neither debt nor inability to pay debt is in *any 'degree heinous*,' it is, we conceive, in direct opposition to this spirit to inflict").

[20] Delamere also argued that the amount of the fine was greater than other fines previously imposed, and that the proceedings "will make ... the government look very rigid and severe," which "will set [the people] upon their guard." *Id.* at 578.

Trials. See Sollom Emlyn, *Preface*, in *A Complete Collection of State Trials* (1730 ed.). Emlyn emphasizes that the judge, "though he be intrusted with so great power, yet he is not at liberty to do as he lists, and inflict what arbitrary Punishments he pleases; due regard is to be had to the Quality and Degree, to the Estate and Circumstances of the Offender, and to the greatness or smallness of the Offence[.]" *Id.* at x. This was important because "that Fine, which would be a mere trifle to one man, may be the utter ruin and undoing of another[.]" *Id.* Moreover, failure to abide by these precepts would undermine the proportionality principle as well: "If no Measures were to be observed in these discretionary Punishments, a Man who is guilty of a Misdemeanor might be in a worse Condition than if he had committed a capital Crime" because "he might be exposed to an indefinite and perpetual Imprisonment, a Punishment not at all favour'd by Law, as being worse than death itself[.]" *Id.*[21]

Blackstone's observations are also instructive. After noting that "[t]he reasonableness of fines has also been usually regulated by the determination of *magna carta* concerning amercements for misbehavior in matters of civil right," 4 Blackstone, *Commentaries* *372, Blackstone recites the language of Magna Carta and describes that the law requires "that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his

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[21] See also, e.g., *Rex v. Bennett*, 1 Strange 101, 93 Eng. Rep. 412, 413 (K.B. 1718) ("The fine here will be *salvo contenemento*, according to Magna Charta, and the Bill of Rights.") (argument).

merchandize; and to the countryman his wainage, or team and instruments of husbandry." *Id.* Blackstone elaborates:

> [T]he ancient practice was to enquire by a jury, when a fine was imposed upon any man, *quantum inde regi dare valeat per annum, salva sustentatione sua, et uxoris, et liberorum suorum.*[22] And, since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelyhood; but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life.

Id. at *373; see also *id.* at *371 (stating that "the duration and quantity" of "discretionary fines and discretionary length of imprisonment" "must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances"); *id.* ("[t]he *quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law" because "[t]he value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's").

In the 1770s, William Eden (Baron Auckland) discussed these principles in his treatise, *Principles*

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[22] Lit. "How much from thence he be able to pay the King annually, having besides a maintenance for himself, his wife and children." Thomas Tayler, *The Law Glossary* 347 (1833 ed.).

of Penal Law. After suggesting that "the Bill of Rights was only declaratory of the old constitutional privileges," Eden writes that "[i]t is the usage of the courts, superinduced on the clause of Magna Charta relative to civil amercements, never to extend the fine of any criminal so far, as to take from him the implements, and means of his profession, and livelihood; or to deprive his family of their necessary support." William Eden (Baron Auckland), *Principles of Penal Law* 72-73 (3d ed. 1775).

Joseph Chitty's early nineteenth century criminal treatise also presents an extensive discussion of this rule. Chitty explains that where a discretionary power to punish is delegated to a court, "it must not be understood that the power thus vested in them is a mere arbitrary discretion, which ignorant or malevolent magistrates would be allowed with impunity to abuse." 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 489 (1819 ed.). "Before the revolution," Chitty observes, "the court of Star-chamber levied the most exorbitant fines upon the subject in defiance of every principle of law, to enrich the treasuries of the sovereign." *Id.* "[B]y the bill of rights," however, "it was specifically enacted, that excessive fines be not imposed"; "since this provision, it is never usual to assess a larger fine than the delinquent is able to pay without touching the means of his subsistence[.]" *Id.* at 490.

In short: substantial evidence suggests that Magna Carta, the common law, and the English Bill of Rights were understood to require that a just and lawful monetary penalty (1) be proportionate to the offense and (2) not destroy a minimum core level of economic security and subsistence for those against whom penalties are assessed, determined with

reference to personal circumstances and ability to pay.

II. FROM THE EARLY YEARS OF AMERICAN HISTORY, FREEDOM FROM EXCESSIVE FINES WAS RECOGNIZED AS A FUNDAMENTAL RIGHT

A. Early American Understandings of the Right to Freedom from "Excessive Fines" Were Informed by the Lessons of History

The fundamental right to freedom from excessive fines was embraced by the American colonists. The colonists "looked upon the English Constitution as their own," H.D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 Colum. L. Rev. 1, 23 (1917), and "English law—as authority, as legitimizing precedent, as embodied principle, and as the framework of historical understanding—stood side by side with Enlightenment rationalism in the minds of the Revolutionary generation." Bernard Bailyn, *The Ideological Origins of the American Revolution* 31 (1967).

Even before the English Bill of Rights was enacted, American colonists had sought to claim for themselves the right to freedom from unreasonable and oppressive fines. The Pennsylvania Frame of Government of 1682—one of "the most influential of the Colonial documents protecting individual rights," 1 Schwartz, *Documentary History* 130—provided "[t]hat all fines shall be moderate, and saving men's contenements, merchandize, or wainage." Penn. Frame of Gov., Laws Agreed Upon in England, art.

XVIII (1682), reprinted in 1 Schwartz, *Documentary History* 132, 141. Likewise, the New York Charter of Liberties and Privileges of 1683 provided "[t]hat A ffreeman Shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the Greatnesse thereof Saveing to him his freehold, And a husbandman saveing to him his Wainage and a merchant likewise saveing to him his merchandize[.]" N.Y. Charter of Liberties and Privileges (1683), reprinted in 1 Schwartz, *Documentary History* 163, 165.

A few years later, during Maryland's Protestant Revolution of 1689—when religious and economic tensions led to a revolt against the proprietary government—one stated reason for the rebellion was "[t]he Imposseinge Exessive fines Contrary to magna Charta without any respect had to the *salvo Contenemento suo sibi* therein Injoyned." *Mariland's Grevances Wiy The Have Taken Op Arms'*, reprinted in 8 J. S. Hist. 392, 401 (1942). See also David S. Lovejoy, *The Glorious Revolution in America* 288-91 (1987) (discussing the rebellion and its causes).

In 1721, Jeremiah Dummer's influential work *A Defence of the New-England Charters* declared that "[t]he Subjects Abroad claim the Privilege of *Magna Charta*, which says that no Man shall be fin'd above the Nature of his Offense, and whatever his Miscarriage be, a *Salvo Contenemento suo* is to be observ'd by the Judge." Jeremiah Dummer, *A Defence of the New-England Charters* 16-17 (1721).

By the Founding, documents such as Magna Carta, the Habeas Corpus Act, and the English Bill of Rights had long represented "a towering common law lighthouse of liberty—a beacon by which framing lawyers in America consciously steered their course."

Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 663 (1996). Broad acceptance of common law rights was consistent with the high esteem in which the leading English expositors of the law were held. Coke's "*Institutes* 'were read in the American Colonies by virtually every student of the law," *Kerry v. Din*, 135 S.Ct. 2128, 2133 (2015) (plurality) (quotation omitted), and Blackstone was "the preeminent authority on English law for the founding generation," *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (quotation omitted). The Founders were also "aware and took account of the abuses that led to the 1689 Bill of Rights." *Browning-Ferris*, 492 U.S. at 267.

The landmark Virginia Declaration of Rights of June 1776 echoed the English Bill of Rights, providing "[t]hat excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." Va. Decl. of Rts., § 9. Section 9 was one of several provisions "borrowed from England," Edmund Randolph, *Essay on the Revolutionary History of Virginia* (c. 1809-1813), reprinted in 1 Schwartz, *Documentary History* 246, 248, in a document that in many respects "was a restatement of English principles—the principles of Magna Charta, the Petition of Rights, the Commonwealth Parliament, and the Revolution of 1688." Allan Nevins, *The American States During and After the Revolution, 1775-1789* 146 (1924).[23]

Virginia's Declaration, in turn, influenced the declarations of rights of other states and, ultimately,

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[23] Cf. *Solem*, 463 U.S. at 286 ("use of the language of the English Bill of Rights" deemed "convincing proof" of intent "to provide at least the same protection").

the Bill of Rights itself. By 1787, "[e]ight states ... had state constitutions prohibiting the imposition of excessive fines"[24] and, in 1789, four states—Virginia, Pennsylvania, New York, and North Carolina—urged that the Nation's charter be amended to include such a provision. 2 Schwartz, *Documentary History* 1167. The amendments proposed by the Virginia Ratifying Convention were particularly influential. *Id.* at 762-65.

In light of this history, early decisional law interpreting the Virginia Declaration of Rights is particularly instructive. For example, in *Jones v. Commonwealth*, 5 Va. (1 Call) 555 (1799), the Supreme Court of Appeals of Virginia was called upon to consider whether a fine could be assessed jointly. At the time, the imposition of fines in Virginia was governed both by the excessive fines clause of the Virginia Declaration and by a 1786 statute that implemented the constitutional provision by requiring that "in every ... information or indictment, the amercement ... ought to be according to the degree of the fault, and saving to the offender his contenement[.]" 1786 Va. Laws ch. 64, at 42. One member of the *Jones* court, Judge Spencer Roane, described the 1786 statute as "founded on the spirit" of the Declaration's excessive fines provision. *Id.* at 556-57.

In deciding whether a joint fine could lawfully be imposed, Judge Roane referred to William Hawkins' *Treatise of the Pleas of the Crown*, which in turn relied upon *Godfrey's Case* as "establish[ing] the

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[24] Steven G. Calabresi et. al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. Cal. L. Rev. 1451, 1517 (2012).

doctrine ... bottomed upon an article of *magna charta*, that fines be imposed *secundum quantitatem delicti salvo contenemento*[.]" *Id.*[25]

Judge Roane further reasoned that a prohibition on joint fines was "fortified not only by the principles of natural justice, which forbid that one man should be punished for the fault of another; but also, by the clause of the bill of rights prohibiting excessive fines and the act of 1786 founded on the spirit of it and providing, that the fine should be according to the degree of the fault and the estate of the offender." *Id.* at 556-57. See also *id.* (such a result would be "unjust and contrary to the spirit of the constitution"). A second member of the three-judge panel concurred that the joint fine was unlawful, reasoning that "it is clear that the makers of the constitution, as well as the Legislature contemplated, that no addition, under any pretext whatever was to be imposed, upon the offender, beyond the real measure of his own offence." See *id.* at 557-58 (Carrington, J.).

Other early state decisions also looked to traditional common law principles. See, e.g., *Commonwealth v. Morrison*, 9 Ky. (2 A.K. Marsh.) 75, 99 (1819) (fine "should bear a just proportion to the offense committed" and to "the situation, circumstances and character of the offender"); see also *Spalding v. New York*, 45 U.S. 21, 30 (1846) (argument by counsel that fine "was excessive, and was a cruel punishment for the offence, for it imposed an impossibility" and that "[t]he law never

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[25] Lit. "according to the quantity of the offense, saving contenement."

imposes a fine, where it presumes the party can have nothing to pay").[26]

American commentators also drew on the lessons of history. The 1829 edition of William Rawle's treatise characterized the Eighth Amendment as "protect[ing]" "against all unnecessary severity in the prosecution of justice," and looked to the history of the Stuart period for guidance as to the meaning of the Excessive Bail Clause. William Rawle, *A View of the Constitution of the United States* 130 (2d ed. 1829). Story's *Commentaries* similarly drew connections between the Eighth Amendment and the English Bill of Rights, explaining that the Eighth Amendment served "to warn ... against" a repeat of the events that had transpired during "the arbitrary reigns of some of the Stuarts"—when, among other things, "[e]normous fines and amercements were ... sometimes imposed[.]" Joseph Story, *Commentaries on the Constitution of the United States* 710-11 (1833 ed.). Benjamin Oliver's 1832 treatise suggests that imposing "[a] ruinous fine upon an inconsiderable offence, or otherwise wholly disproportioned to the magnitude of it" "would be inconsistent with the spirit" of the Eighth Amendment. Benjamin L. Oliver, *The Rights of an American Citizen* 185 (1832). Oliver further suggests that "[a] man's farm or stock in trade, ought never to be made a sacrifice, to the ruin of himself and the distress of his family, but, if necessary to make an example, he should rather be

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[26] The doctrinal basis of this Court's decision in *Spalding* is unclear, but the case—involving a state proceeding—predates not only modern incorporation jurisprudence, but the ratification of the Fourteenth Amendment itself.

imprisoned for a longer period, and a more moderate fine be imposed." *Id.*

Thomas Cooley's 1868 treatise *Constitutional Limitations*—which was "influential"[27] and "massively popular"[28] in its time—observes that although "the question what fine shall be imposed is one addressed to the discretion of the court," that discretion is "to be judicially exercised, and it would be error in law to inflict a punishment clearly excessive." Cooley, *Constitutional Limitations* 328. Cooley elaborates: "A fine should have some reference to the party's ability to pay it." *Id.* Cooley bases this conclusion on Chapter 14 of Magna Carta, the "merciful spirit" of which "addresses itself to the criminal courts of the American States through the [excessive fines] provisions of their constitutions." *Id.* at 328-29. In this regard, Cooley also refers approvingly to the general rule that "[t]he common law can never require a fine to the extent of an offender's goods and chattels[.]" *Id.* at 329 (quoting *State v. Danforth*, 3 Conn. 112, 116, 117-18 (1819)).

Additionally, the historical record suggests that at least some colonial and early state courts did, in practice, consider the individual characteristics of offenders when determining and remitting fines. See, e.g., Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 350 (1982) (fines "tailored individually to the particular case" and set such that "it was within the expectation on the part of the court that it would

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[27] *McDonald v. City of Chicago*, 561 U.S. 742, 821 (2010) (Thomas, J., concurring in part and concurring in the judgment).

[28] *Heller*, 554 U.S. at 616.

be paid"); Chilton L. Powell, *Marriage in Early New England*, 1 New England Q. 323, 333 n.23 (1928) (noting court records indicating that "amount [of fines] apparently depend[ed] upon the culprits' ability to pay").

B. In Colonial and Early State History, the Term "Fines" Was Understood to Encompass a Broad Range of Penalties

There is substantial historical evidence that protection from "excessive fines," properly conceptualized, extends to a variety of different forms of economic sanctions—including civil forfeitures. The historical record does not offer a precise definition for the term "fines." See *Browning-Ferris*, 492 U.S. at 295 (O'Connor, J., concurring in part and dissenting in part). What the historical record does show is that by the eighteenth century, the term "fine" in colonial America had come to be understood as encompassing a broad swath of sanctions. These included penalties payable in cash and in kind (*i.e.*, forfeitures), and penalties made payable not only to the sovereign, but to private parties as well—and not strictly limited to nominally criminal proceedings.

Historically, the terms "fines" and "forfeitures" were used interchangeably. Leading dictionaries of the Founding era suggest that the word "'fine' was understood to include 'forfeiture' and vice versa." *Austin v. United States*, 509 U.S. 602, 614 n.7 (1993) (citing Founding-era sources). Further, many colonial and early American "statutes referenced 'fines and forfeitures' simultaneously when referencing economic sanctions[.]" Colgan, *Reviving*

302 & n.136 (citing 1778 Conn. Pub. Acts 485-89; 1776-1777 Del. Laws 354-56 (1777); 1765 Ga. Laws 248-64; 1782 Md. Laws xvii-xviii; 1747 Mass. Acts 237-39; 1780 N.H. Laws 229; 1786 N.J. Laws 344; 1782 N.Y. Laws 479; 1777 N.C. Sess. Laws 208-26; 1771 Pa. Laws 361; 1783 R.I. Pub. Laws 52; 1769 S.C. Acts i-276; 1764 Va. Acts 449-50; 1779 Vt. Acts & Resolves 64-65). For example, a 1782 Delaware statute required an offender to "forfeit and pay the Sum of Three Shillings and Nine-pence," referring to the penalty as "the said Fine and Forfeiture." *Id.* (quoting 1782 Del. Laws 4 (1782)).

Similarly, a New York statute "prohibiting willfully setting fire to the woods dictated that one so convicted 'shall forfeit and pay the sum of five pounds ... and for want of effects to pay such fine the offender or offenders shall be committed" to a period of imprisonment," *id.* (quoting 1785 N.Y. Laws 63), while a Rhode Island statute prohibited grain millers from taking an excess toll "upon the Penalty of forfeiting as a Fine Twelve Pounds for each Offence," *id.* (quoting 1779 R.I. Pub. Laws 20); see also, e.g., *Hanscomb v. Russell*, 77 Mass. 373, 374-75 (1858) (observing that the term "fine" has a narrow "technical meaning[ ]," but also recognizing that "the word 'fine' has other meanings; as appears by most of the dictionaries of our language, where it is defined not only as a pecuniary punishment, but also as a forfeiture, a penalty, &c" and concluding that it was appropriate to interpret the word "fine" to "include not only one of its technical meanings, but also its meaning 'according to the common and approved usage of the language'" (quotation omitted)).

"Fines" as a category also included economic sanctions payable to parties other than the

sovereign; indeed, "[f]rom the colonies' earliest days, legislatures and courts directed fines to be paid to the sovereign as well as to a variety of other persons, a practice which continued post-Revolution and post-ratification." Colgan, *Reviving* 310. As early as 1641, the Massachusetts Body of Liberties referred to the imposition of "a proportionable fine *to the use of defendant*" as a penalty for civil suits that had been improperly brought. Mass. Body of Liberties § 37 (1641), reprinted in 1 Schwartz, *Documentary History* 71, 76 (emphasis added).

Myriad examples exist in the historical record in which "fines" were payable to victims and other nongovernmental entities. See, e.g., 1702 Conn. Pub. Acts 10-11; 1672 Conn. Pub. Acts 7 ("pay a fine of One hundred Pounds, to the Parents, Husband, Wife or Children, or next of kin to the party deceased"); 1787 N.Y. Laws 426 ("forfeit to the prisoner or party grieved" for refusal to follow writ of habeas corpus); 1787 N.Y. Laws 398 (malicious and vexatious arrests by sheriff: "forfeit and pay to the party or parties, so arrested or attached"); 1785-1786 Del. Laws 8 (1786) ("forfeit treble Damages to the Party grieved for abuse of duties"); 1785 Pa. Laws 244 ("forfeit to the prisoner or party grieved"); 1702 N.Y. Laws 49 ("forfeit and pay, to the Party thereby being grieved"); *cf.* 1759 R.I. Pub. Laws 80 (fines for fire distributed "among the Poor most distressed by the Fire"); see also Colgan, *Reviving* 302-308 (discussing additional examples).

"Colonial and state statutes, as well as courts of the period, also routinely split awards between a sovereign and individuals." *Id.* at 306. A 1766 Delaware statute awarded half of fines assessed against a public guardian to "the orphan or minor"

injured by the guardian's neglect. 1700-1769 Del. Laws 423 (1766). And a 1759 New Hampshire statute provided for a "fine" for breaking street lamps, where "all such Fines shall be Applied in this manner namely, out of the same the owner or owners of such Lamp or Lamps shall be payed the damages he she or they have sustained." 1754 N.H. Laws 73.

In *Goodall v. Bullock*, Wythe 328, 1798 WL 247 (Va. Ch. 1798), the Virginia High Court of Chancery further clarified that a "fine" need not be paid to a sovereign: "[N]ot all fines, but only those inflicted for offences against the government, were formerly payable to the king." *Id.* at *3. *Goodall* explained that "the fine in this case is appropriated to the party injured, because it is recoverable on the motion, that is, by the action, of the party injured[.]" *Id.*

Finally, the historical record is consistent with the observation, made in Justice O'Connor's separate opinion in *Browning-Ferris*, that the understanding of the term "fine" would not have been limited to proceedings labeled "criminal." In addition to historical evidence marshalled by Justice O'Connor, see *Browning-Ferris*, 492 U.S. at 287-90, 295-97 (O'Connor, J., concurring in part and dissenting in part), it is noteworthy that, in the Founding era, both fines and forfeitures were explicitly recoverable by actions of debt—a nominally civil procedure. See Colgan, *Reviving* 319.

In sum, the historical record would support the conclusion that fines were understood to encompass other forms of economic sanctions, including civil forfeitures, thus ensuring that the excessiveness inquiry be available so as to guard against arbitrary abuses that Magna Carta and its progeny were designed to prevent.

CONCLUSION

More than two decades ago, this Court began the project of "rescu[ing] from obscurity" the Excessive Fines Clause. *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 803 n.2 (1994) (Scalia, J., dissenting). That project remains ongoing.[29] As this Court continues its work, the unique history of the Excessive Fines Clause may represent one source of guidance.

Respectfully submitted,

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[29] For example, some courts have subjected forfeitures of homes and vehicles to particularly searching constitutional review because "in our society, a home and a vehicle are often essential to one's life and livelihood." *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 639 Pa. 239, 279, 160 A.3d 153, 177 (2017); see *Bajakajian*, 524 U.S. at 340 n.15 (reserving the question whether "wealth or income are relevant to the proportionality determination").

APPENDIX—*Amici Curiae*[30]

John D. Bessler is Associate Professor at the University of Baltimore School of Law and serves as an Adjunct Professor of Law at Georgetown University Law Center. He is the author of nine books, including: *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment* (2012); *The Death Penalty as Torture: From the Dark Ages to Abolition* (2017); and *The Baron and the Marquis: Liberty, Tyranny, and the Enlightenment Maxim That Can Remake American Criminal Justice* (forthcoming 2018).

Beth A. Colgan is Assistant Professor at UCLA School of Law and author of *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2 (2018), *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277 (2014), and *Fines, Fees, and Forfeitures*, in *Reforming Criminal Justice - Volume 4: Punishment, Incarceration, and Release* (Erik Luna ed. 2017).

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[30] Parts of this brief have been drawn from Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277 (2014), and Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833 (2013).

No. 17-1091

IN THE
Supreme Court of the United States

TYSON TIMBS, et al.,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Writ of Certiorari
To the Supreme Court of Indiana

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of God-given liberties and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because the practice of civil forfeiture has been abused to wrongfully deprive people of their God-given right to property and to wrongfully punish people through the intermingling of criminal and civil law. In addition, the Foundation believes that this Court should apply its constitutional jurisprudence of incorporation consistently, which means incorporating the Excessive Fines Clause in the same way that it has incorporated most of the other provisions of the Bill of Rights.

SUMMARY OF ARGUMENT

Mary Misdemeanor is charged with a minor drug offense. She pleads guilty, or is found guilty, pays a fine, and receives a suspended sentence. Not a pleasant experience, she thinks, but at least it's over

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief through filing blanket consent forms. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

with, and perhaps justice was done. Case closed, move on.

But then she is shocked to find out that her case isn't closed after all. Because she transferred the marijuana in her home, or transported it in her car, now the government is taking her home or car through something called "civil forfeiture." She calls her court-appointed attorney who informs her he can no longer represent her because she is not entitled to court-appointed counsel in a civil proceeding. And he further informs her that not only can the government take this "second bite out of the apple;" they don't have to give her the presumption of innocence or the other protections that apply in the criminal process.

"But when I pleaded guilty and received my sentence," she says, "I thought that was the end of it." "No," the attorney says, "this is independent of your criminal case. In fact, the state could take your home through civil forfeiture even if the jury had found you innocent, or even if no charges had been filed against you at all."

"But what about the Bill of Rights?" Mary asks. The attorney answers, "That won't help. Even if this is an excessive fine under the Eighth Amendment, under the doctrine of selective incorporation that clause does not apply to state and local governments. It is not implicit in the concept of ordered liberty."

"Not implicit in what?" By this time Mary is incredulous, wondering whether those words in the

Pledge she had always recited, "with liberty and justice for all," were nothing but a meaningless sham.

In this brief the Foundation hopes to give voice to Mary's concerns. Civil forfeiture is punishment and thus comes under the Excessive Fines Clause of the Eighth Amendment, a clause that is fully as implicit in the concept of ordered liberty as the Cruel and Unusual Punishments Clause and the Excessive Bail Clause, and therefore, consistent with the way the Court has incorporated other rights, it should be applied to state and local governments.

Civil forfeiture is especially opprobrious because it infringes upon the God-given right to property, a right the Framers held sacred.

The Foundation will further argue that civil forfeiture is an improper comingling of civil law and criminal law, two realms of justice that should be kept separate and distinct.

ARGUMENT

When organizations as diverse and polarized as the *amici* supporting the Petitioners are on the same side, that case must be unusual. But the much-abused practice of civil forfeiture has raised concerns among conservative constitutionalists, civil libertarians, advocates for the poor and disadvantaged, and many others.

The reason is clear: Civil forfeiture, both in theory and in practice, violates fundamental rights enshrined in the Constitution.

I. Regardless of the validity of the incorporation doctrine, the doctrine of selective incorporation is subject to manipulation and abuse.

Since the adoption of the Fourteenth Amendment in 1868, great legal thinkers, including members of this Court, have advocated "non-incorporation" (that the Fourteenth Amendment does not incorporate the Bill of Rights), "total incorporation" (that the Fourteenth Amendment incorporates all of the Bill of Rights), and "selective incorporation" (that the Fourteenth Amendment incorporates only some of the Bill of Rights.

A. Non-incorporation:

Justice Frankfurter summarized the non-incorporation view in his concurring opinion in *Adamson v. California*, 332 U.S. 46, 62 (1947):

> Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court -- a period of 70 years -- the scope of that Amendment was passed upon by 43 judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the

> belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States.

Others who have articulated this position include Colonel Charles Fairman, Professor of Law at Stanford, *Does the Fourteenth Amendment Incorporate the Bill of Rights? An Original Understanding*, 2 Stan. L. Rev. 5 (1949), and Yale Professor Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Liberty Fund 1977).

A more recent scholar, David Benner, in *The Fourteenth Amendment and the Incorporation Doctrine* (Life and Liberty, 2017), who argues that the purpose of the Fourteenth Amendment was not to incorporate the Bill of Rights but rather to provide a constitutional basis for the Civil Rights Act of 1866.

B. Total Incorporation:

At the opposite extreme, Justice Black, joined by Justice Douglas, expressed the total incorporation view in his *Adamson* dissent:

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as

> well as those who opposed its submission and passage, persuades me that one of the chef objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.

Adamson, 332 U.S. at 71-72 (Black, J., dissenting).

C. Selective Incorporation:

In recent decades neither the non-incorporation position nor the total incorporation position has been able to command a majority on the Court. As a result, the selective incorporation view has emerged as an unsteady compromise. This view holds that certain provisions of the Bill of Rights are incorporated and applied to the states, and certain others are not.

Those provisions of the Bill of Rights that are incorporated are said to be those which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934), or which are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 332 U.S. 319, 325 (1937).

But these formulations make the selective incorporation doctrine highly subjective. As Justices Harlan and Stewart said in their *Duncan v. Louisiana* dissent,

> Today's Court still remains unwilling to accept the total incorporatists' view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial of trial by jury in the situation before us, or in other situations, is fundamentally unfair. Consequently the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is "in" or "out."
>
> The Court has justified neither its starting place nor its conclusion.

Duncan v. Louisiana, 391 U.S. 145, 180-81 (1968) (Stewart, J, dissenting).

Justice Frankfurter's *Adamson* concurrence further illustrates the subjectivity of selective incorporation:

> There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. The protection against unreasonable search and seizure might have primacy for one judge, while trial by a jury of 12 for every claim above $20 might appear to another as an ultimate need in a free society.

Adamson, 322 U.S. at 65 (Frankfurter, J., concurring).

In the original draft, the writer of this brief mistakenly titled this subsection "Subjective Incorporation." He corrected it to "Selective Incorporation," but upon reflection he concludes that the original title was not far from the mark. Selective incorporation is in reality subjective incorporation.

Even though contemporary jurisprudence generally moves within the limits of selective incorporation, with some advocating a broader degree of incorporation and others advocating a more limited degree of incorporation, the selective incorporation approach is highly selective, subject to abuse, and therefore dangerous to constitutional liberty and limited government. Although the Foundation questions the historical and constitutional basis for both selective incorporation and total incorporation, we urge this Court not to single out certain provisions of the Bill of Rights as less deserving of protection than others. The protection against excessive fines is as implicit in the concept of ordered liberty and as essential to fundamental freedom as other provisions of the Bill of Rights that have been held applicable to the states.

II. The Excessive Fines Clause is at least as deserving of incorporation as other portions of Bill of Rights.

A. Its placement with Cruel and Unusual Punishment and Excessive Bail in the Eighth Amendment.

The Framers placed the Excessive Fines Clause, the Cruel and Unusual Punishment Clause, and the Excessive Bail Clause in an amendment by themselves, separate from the others, for a reason: They deal with outcomes rather than processes, ends rather than means.

Provisions of the Fourth, Fifth, and Sixth Amendments dealing with search and seizure, grand jury indictment, double jeopardy, self-incrimination, public trial, trial by jury, confrontation, and right to counsel relate processes and means -- no one can be punished unless and until these procedures have been followed.

But the provisions of the Eighth Amendment deal with ends -- punishment itself. Punishment may not be cruel and unusual, and if the punishment is a fine, that fine may not be excessive. The Excessive Bail Clause is in this category as well, because bail involves the actual payment of money as a condition for being free prior to conviction.

These three clauses also stood together in the English Bill of Rights of 1689:

> And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects;
>
> And excessive fines have been imposed;
>
> And illegal and cruel punishments inflicted;
>
> And several grants and promises made of fines and forfeitures before any conviction or judgment against the

> persons upon whom the same were to be levied;
>
> All which are utterly and directly contrary to the known laws and statutes and freedom of this realm;...[2]

B. The other clauses of the Eight Amendment are applied to the states.

The Cruel and Unusual Punishments Clause was held applicable to the states in *Robinson v. California*, 370 U.S. 660 (1962).

It is difficult to get a clear Supreme Court ruling on whether the Excessive Bail Clause applies to the states, because bail issues are commonly moot by the time a defendant's case reaches the Supreme Court. But the Excessive Bail Clause appears to apply to the states; in *Schilb v. Kuebel*, 404 U.S. 357 (1971), this Court said in dicta, "Bail, of course, is basic to our system of law, and the Eighth Amendments' proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." The Eighth Circuit held the clause applicable to the states in *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981), but the decision was vacated for mootness, *Murphy v. Hunt*, 455 U.S. 478 (1982). Bail definitely acts as a punishment, whether or not it is called punishment, because the criminal

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[2] English Bill of Rights (1689); *reprinted in* 3 John Eidsmoe, *Historical and Theological Foundations of Law* 1085 (Nordskog 2016).

defendant must either pay a substantial sum of money (which he may receive back in part) or lose his liberty prior to being convicted.

C. Civil forfeitures violate property rights.

Civil forfeitures constitute a taking of property, and the Framers held property rights to be sacred. Thomas Jefferson and the Continental Congress said in the Declaration of Independence that this nation is entitled to independence under the "laws of nature and of nature's God" and that all men are "endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." *The Declaration of Independence* para. 1-2 (U.S. 1776). As the Virginia Declaration of Rights stated, property was indispensable to the pursuit of happiness:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[3]

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[3] Virginia Declaration of Rights (drafted by George Mason, ratified unanimously by the Fifth Virginia Convention at Williamsburg June 12, 1776, influential on the Declaration of Independence and the Bill of Rights); quoted in Mary-Elaine

In a similar vein, the Framers of the Fifth and Fourteenth Amendments spoke of the rights of "life, liberty, or property," because they regarded both as deeply rooted in our history and tradition, implicit in the concept of ordered liberty, and essential to fundamental fairness. Their respect for property rights, like that of John Locke, was based upon the Ten Commandments which protect property rights by forbidding theft ("Thou shalt not steal," *Exodus* 20:15, *Deuteronomy* 5:19) and "Thou shalt not covet," *Exodus* 20:17, *Deuteronomy* 5:21). In 1982, Congress passed Public Law 97-280 which declared 1983 the "Year of the Bible." Public Law 97-280 states in part,

> Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States...[4]

The Framers' high view of property rights is utterly inconsistent with civil forfeiture as it is practiced today.

Swanson, *John Locke: Philosopher of American Liberty* 224 (Nordskog 2012).

[4] Public Law 97-280, October 4, 1982.

D. Civil forfeitures operate as punishments.

Likewise, regardless of what they are called, forfeitures involve ends, not means, as they constitute deprivation of criminal defendants (and sometimes unindicted persons or other completely innocent persons) of their property. This Court has recognized that both criminal forfeitures and civil forfeitures constitute fines for the purposes of the Excessive Fines Clause; see *Austin v. United States*, 509 U.S. 602 (1993) (civil forfeiture), and *Alexander v. United States*, 509 U.S. 54 (1993) (criminal forfeiture). In *Austin* the Court noted that various provisions of the Fifth and Sixth Amendments expressly applied only to criminal proceedings, but

> The text of the Eighth Amendment includes no similar limitation. ... Nor does the history of the Eighth Amendment require such a limitation. ...Section 10 of the English Bill of Rights of 1689 is not expressly limited to criminal cases either. The original draft of Sec. 10 as introduced in the House of Commons did contain such a restriction, but only with respect to the bail clause: "The requiring excessive Bail of Persons committed in criminal Cases, and imposing excessive Fines, and illegal Punishments, to be prevented." 10 H. C. Jour. 17 (1688-1689). The absence of any similar restriction in the other two clauses suggests that they were not

> limited to criminal cases. In the final version, even the reference to criminal cases in the bail clause was omitted. See 1 W. & M., 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689) ("That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted"); see also L. Schwoerer, The Declaration of Rights, 1689, p. 88 (1981) ("But article 10 contains no reference to `criminal cases' and, thus, would seem to apply . . . to all cases").

Austin, 509 U.S. at 608-09.

To argue that civil forfeitures cannot constitute excessive fines is to ignore reality. The forfeited property may be a vehicle or a home that is worth many times the maximum fine for the offense. It may be a vehicle the defendant has saved for years to buy, that the defendant uses to transport her children to and from school, that the defendant uses in his work, and/or that the defendant has heavily mortgaged.[5] To charge a person with an offense for

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[5] The rights of mortgagors and mortgagees concerning forfeited property are discussed in Houston S. Park III, *Innocent Mortgagees and In Rem Civil Forfeitures*, 3 U. Miami Bus. L. Rev. 143 (1993), *available at* http://repository.law.miami.edu/umblr/vol3/iss2/4. For the practical effects and hardships upon mortgagors and mortgagees, even if innocent owners, see Patricia M. Canavan, *Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners*, 10 Pace L. Rev. 485 (1990), *available at*

which the maximum punishment is, say, six months in jail and a maximum fine of $500, and then in a separate proceeding force that person to forfeit a vehicle worth maybe $50,000 or a home worth maybe $200,000, and dismiss a constitutional challenge by saying this isn't really punishment, shocks the conscience, is contrary to common concepts of fundamental fairness, and violates norms that are implicit in the concept of ordered liberty. Certainly many if not most criminal defendants would rather pay the criminal penalties than forfeit valuable property to the government.[6]

In *Austin, supra*, this Court recognized that civil forfeitures cannot be considered remedial. They do not protect the public from the instrumentalities of a crime, especially if the "instrumentality" is a home, a business, or a vehicle. Nor do they compensate the government for the cost of law enforcement; civil forfeitures are in no way linked to, tailored to, proportionate to, conditioned upon, or appropriated to

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http://digitalcommons.pace.edu/plr/vol10/iss2/12. Although in most jurisdictions the government would have to use the proceeds of the forfeiture sale to satisfy the lienholder, any remaining balance would normally be the responsibility of the criminal defendant.

[6] In teaching Constitutional Law, to illustrate the relationship between imprisonment and fines, the writer of this brief has occasionally asked students, "Would you rather pay a $100,000 fine or serve a day in jail?" (Most choose jail). "$50,000 or a week?" (Most still choose jail). "$20,000 versus a month?" (The vote is closer). "$10,000 versus three months?" (The balance shifts). The point of the exercise is to demonstrate that one cannot say categorically that imprisonment is more "cruel and unusual" than a fine or forfeiture.

such costs. As this Court said in *United States v. Ward*, 448 U.S. 242, 254 (1980), "forfeiture of property...[is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." Purely and simply, civil forfeitures are additional punishment, procured through the civil courts rather than the criminal courts.

III. Civil forfeiture wrongfully comingles criminal and civil law.

In the United States as in most Western societies, law is divided into two distinct categories: criminal law and civil law, a division that goes back at least to the Norman Conquest of A.D. 1066. As *Encyclopedia Britannica* explains,

> Criminal law deals with behavior that is or can be construed as an offense against the public, society, or the state -- even if the immediate victim is an individual. ... Civil law deals with behavior that constitutes an injury to an individual or other private party, such as a corporation.[7]

In his *Commentaries on the Laws of England*, Sir William Blackstone treated criminal law in a separate volume (Book 4), saying criminal law "treats

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[7] Brian Duignanm, *What Is the Difference Between Criminal Law and Civil Law*, Encyclopedia Britannica, https://www.britannica.com/story/what-is-the-difference-between-criminal-law-and-civil-law

of public wrongs" while civil law deals with private wrongs.

The purposes of the criminal justice system are to determine guilt and innocence, establish justice by prescribing just punishment, and protect society from crime. The purposes of the civil justice system are to protect the rights of individuals and to provide a remedy for those who have been wronged (commonly by tort or by breach of contract) by putting those wronged persons in the position they would be in had the tort or breach not occurred. [8]

Because civil law and criminal law have distinct purposes and methods of operation, they should be carefully distinguished and not mixed. Writing in the *Yale Law Journal*, Noah M. Kazis explains that

> Legal education, courts, and law offices alike treat civil and criminal law separately. Indeed, "every society sufficiently developed to have a formal legal system," from Rome to the present, "uses the criminal-civil distinction as an organizing principle. ...
>
> The consistent efforts to locate the tort/crime line reflect an underlying scholarly consensus that we ought to maintain it. Legal-process scholars believed that "a basic 'method' distinguished the criminal law," which

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[8] 4 Sir William Blackstone, *Commentaries on the Laws of England* 1 (Philadelphia: Robert Bell, 1772).

> included a focus on morally culpable mental states and legislatively detailed crimes, and that any "substantial deviation from that 'method' threatened the criminal law's legitimacy." John Coffee, arguably the tort/crime line's leading contemporary defender, argued that blurring weakens the criminal law's unique role in moral education. Tort law, in contrast, is seen as pricing harms rather than prohibiting them outright. Others have argued that criminal law's harsher punishments as compared to tort's, such as imprisonment and long-term discrimination, require justification. With notable exceptions, most legal scholars agree that the law should "resist the temptation to mix and match doctrines and functions at will."[9]

Recognizing this distinction, until 1983 DR7-105(a) of the ABA Model Code of Professional Responsibility provided:

> (A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

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[9] Noah M. Kazis, *Tort Concepts in Traffic Crimes*, 125 Yale L. J. 4 (2016), https://www.yalelawjournal.org/comment/tort-concepts-in-traffic-crimes. (Internal citations omitted).

Ethical Consideration 7-21 of the Model Code further explained:

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

After the Model Code was withdrawn in 1983, the new ABA Model Rules of Professional Conduct, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 92-963 which explained that DR 7-105 was not carried forward because the Model Rules provide adequate safeguards against improper threats, and DR 7-105 was redundant and/or overbroad.[10] However, many states have carried forward the DR-7-105 prohibition

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[10]https://www.americanbar.org/newsletter/publications/youraba/201205article11.html

into their professional responsibility codes; these include Alabama, Connecticut, Georgia, Hawaii, Idaho, Louisiana, New Jersey, South Carolina, Tennessee, Vermont, and Wyoming. California, Colorado, and Maine have similar rules.[11]

Just as it is improper to use the criminal process to pursue a civil end, so it is even more egregious to use the civil process to pursue a criminal end. And that is precisely what civil forfeiture is all about -- using the civil justice system to further punish a criminal defendant.

The Foundation believes using civil forfeiture to pursue criminal justice ends is especially egregious because it imposes punishment upon a criminal defendant without affording that defendant the protections of the criminal justice system. The many rights afforded the criminal defendant include the right to be free from unreasonable search and seizure, protection against self-incrimination, protection against double jeopardy, public trial by jury, the right to confront and cross-examine witnesses, the right to counsel, the presumption of innocence until proven guilty beyond a reasonable doubt, and many others.

This could lead to all sorts of abuses, such as a prosecutor withholding all mention of civil forfeiture until the criminal case is completed, or worse, a prosecutor using the threat of civil forfeiture to coerce a guilty plea on the criminal charge.

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[11] *Id.*

By contrast, civil forfeiture processes afford none of these protections. The government's burden is at most preponderance of evidence, and sometimes less than that, because sometimes the defendant must bring legal action to recover his property and bears the burden of proof himself. In many jurisdictions he must bring the action within a very short period of time and must provide his own counsel and bear all of the expenses of the civil action. And the civil forfeiture is not necessarily the result of a criminal conviction; a civil forfeiture action may occur before, during, or after the criminal case, or even in the absence of a criminal case. The government may pursue a civil forfeiture even if the defendant has been acquitted, the charges have been dismissed, or even if the government has not brought any criminal charges at all. Furthermore, the government may bring the civil forfeiture action even if the property belongs to someone other than the criminal defendant (a spouse, parent, neighbor, or friend), regardless of whether that person had any involvement in or even knowledge of the alleged crime.[12]

Subjecting people to these types of punishments not only violates the Excessive Fines Clause of the Eighth Amendment; it also violates the Due Process Clause of the Fourteenth Amendment, because it deprives a person of property without the kind of due process that is necessary for an action with such dire

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[12] *Forfeiture - The Distinction Between Criminal and Civil Forfeiture*, JRank, http://law.jrank.org/pages/1230/Forfeiture-distinction-between-criminal-civil-forfeiture.html (last visited Sep. 7, 2018).

consequences. *See Leonard v. Texas*, 137 S.Ct. 847, 847 (2017) (Thomas, J., statement respecting the denial of certiorari).

CONCLUSION

It is time to stop pretending that civil forfeitures are not punishment. The man on the street knows that instinctively, and the courts have come to recognize it as well: civil forfeiture simply gives the government a second opportunity to inflict punishment on the defendant, this time without having to provide the protections of the criminal justice system.

If the laws of the criminal justice system do not provide sufficient punishment for certain crimes, then the legislature can change those laws to make criminal punishments more severe -- provided the requirements of due process are met through the protections of the criminal justice system. But this Court should not allow state and local governments to circumvent the requirements of due process by punishing through this system that is wrongly called "civil" forfeiture.

Respectfully submitted,

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No. 17-1091

In the

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2

Petitioners,

v.

STATE OF INDIANA

Respondent.

On Writ of Certiorari to the Indiana Supreme Court

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Statement of Interest[1]

Andrew Ault, Esq., Jeff Cardella, Esq., and Todd Ess, Esq., Amici Curiae, are criminal defense lawyers in Indianapolis, Indiana and frequently represent defendants in criminal proceedings in Indiana state court, claimants in related state civil forfeiture proceedings and, on occasion, family members and co-claimants of defendants. As attorneys whose clients are adversely affected by the Indiana Supreme Court's holding in *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), Amici have an interest in ensuring that their clients obtain the protection of the Excessive Fines Clause of the Eighth Amendment.

Mr. Cardella was lead counsel in *Washington v. Marion County Prosecutor*, 1:16-cv-02980-JMS, where District Judge Magnus-Stimson granted class certification and held that the State's forfeiture law violated the Eighth Amendment. *See Washington v. Marion County Prosecutor*, 264 F. Supp. 3d 957 (S.D. Ind. 2017). The Indiana forfeiture law permitted the indefinite retention of property pending a forfeiture trial which the district court found to be unconstitutional. The legislature has since amended the statute and the parties are litigating whether

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have given blanket consent to the filing of amicus briefs.

the U.S. Court of Appeals for the Seventh Circuit should vacate the appeal due to changes to the statute.

Summary of the Argument

Indiana's civil forfeiture law is used for the benefit of the State and not its citizens. Incorporation of the Eighth Amendment's Excessive Fines Clause against the State is essential to the protection of the public against abuses and inequities of forfeiture law, practice and procedure.

Indiana's forfeiture law lacks meaningful innocent owner provisions. Under Indiana law, owners of any property (except vehicles) subject to forfeiture have no right to assert an innocent owner defense. Even the State's application of Indiana's innocent owner provision for vehicles has been construed against claimants.

There are no civil forfeiture jury trials in Indiana. Although the State permits jury trials for infractions such as speeding, the Indiana Supreme Court does not allow jury trials in civil forfeiture proceedings. Civil forfeiture in Indiana is treated as an equitable proceeding that is decided by a judge, not a jury.

Finally, the State's policies, procedures and lack of oversight of forfeiture practices and the substantial proceeds generated have created a "policing for profit" system that operates efficiently for law enforcement but disserves the public. Indiana's Constitution provides that all forfeited funds must be deposited into the Common School Fund and lent to the counties for school construction. State legislation has unabashedldy violated that constitutional mandate. Under Indiana's forfeiture law, law enforcement keeps most of the forfeited funds despite the plain language of the State Constitution which prohibits this practice. Smaller counties in Indiana hire private attorneys to prosecute civil forfeiture actions and Indiana law requires that those attorneys be paid on a contingency basis, creating conflicts of interest and violations of due process. Not long ago, a county hired a part-time salaried assistant district attorney who prosecuted criminal cases for the county and simultaneously handled the related civil forfeiture matters on a contingency fee basis. *See In re McKinney*, 948 N.E.2d 1154, 1157 (Ind. 2011) (imposing 120-day suspension against the respondent attorney).

I. Indiana's Excessive Civil Forfeitures

The question presented is whether the Eighth Amendment's Excessive Fines Clause is incorporated against states under the Fourteenth Amendment. The Court's ruling will immediately impact Tyson Timbs, whose 2012 Land Rover LR2, valued at $42,000, was forfeited because he made a pair of two-gram sales of heroin to an undercover police

officer for $535 in total. The trial court found that the forfeiture was excessive. The Indiana Court of Appeals affirmed but the Indiana Supreme Court reversed on the ground that the trial court erred by even conducting an excessiveness inquiry.

Amici regularly represent people like Mr. Timbs and his family. In our experience, Indiana forfeits property such as automobiles more often than it does homes or businesses. For a State that has applied the automobile exception to the Fourth Amendment sparingly, Indiana's focus on vehicle forfeiture is ironic. The Indiana Supreme Court has declined to apply several warrantless search exceptions to an automobile and in doing so has provided a unique rationale:

> Americans in general love their cars. It is, however, particularly important, in the state which hosts the Indy 500 automobile race, to recognize that cars are sources of pride, status, and identity that transcend their objective attributes. We are extremely hesitant to countenance their casual violation, even by law enforcement officers who are attempting to solve serious crimes.

Brown v. State, 653 N.E.2d 77, 80 (Ind. 1985).

Often the property owner is not the wrongdoer. Our experience is that law enforcement will seize a car involved in a single drug transaction

even if the owner was not in the vehicle at the time the crime occurred. Incorporation of the Excessive Fines Clause is needed to protect innocent family member-owners in those circumstances. Otherwise, they will continue to be short-changed of essential due process in Indiana. Our experience and views as defense lawyers are not unique. Indiana Court of Appeals Judge Barnes acknowledged in this case that he was "keenly aware" of:

> the overreach some law enforcement agencies have exercised in some of these cases. Entire family farms are sometimes forfeited based on one family member's conduct, or exorbitant amounts of money are seized.

Indiana v. Timbs, 62 N.E.3d 472, 478 (Ind. Ct. App. 2016).

One element of an Excessive Fines Clause analysis is whether the forfeiture would destroy a defendant's future livelihood. *See United States v. Viloski*, 814 F.3d 104, 112 (2d Cir. 2016). A number of our clients' vehicles have been forfeited based on the vehicle's involvement in a small number of drug transactions, or sometimes only one transaction. Many times the transaction was conducted by a relative who borrowed the vehicle.

In our experience, the vehicle subject to forfeiture is usually one of the only assets owned by the claimant and his family. Forfeiture can result in the loss of a job, the inability to pick up children at

school or not transporting elderly relatives to medical appointments. The vehicle is not just the client's most significant asset, it is an indispensable part of the client's daily life. *See Krimstock v. Kelly*, 306 F.3d 40, 61 (2d Cir. 2002) ("The particular importance of motor vehicles derives from their use as a mode of transportation and, for some, the means to earn a livelihood. An 'individual has an important interest in the possession of his [or her] motor vehicle,' which is 'often his [or her] most valuable possession.'") (brackets in original); *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994) ("Automobiles occupy a central place in the lives of most Americans, providing access to jobs, schools, and recreation as well as to the daily necessities of life."); *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1342-43 (9th Cir. 1977) ("The private interest in the uninterrupted use of an automobile is substantial. A person's ability to make a living and his access to both the necessities and amenities of life may depend upon the availability of an automobile when needed.").

The Indiana Supreme Court's decision in this case has a substantial and harmful impact on our clients who should have the right to challenge a forfeiture as unconstitutionally excessive.

II. Incorporation of the Eighth Amendment is Necessary Because Indiana's Civil Forfeiture Statute Lacks Any Significant Protections for Property Owners.

Indiana does not protect the rights of forfeiture claimants. Incorporation of the Eighth

Amendment's Excessive Fines Clause is necessary in order to accord safeguards for property owners.

This Court's incorporation decision will provide much needed guidance to the lower courts and the Indiana legislature. Determining that states are bound by the Eighth Amendment's Excessive Fines Clause will reduce the fundamental unfairness of civil forfeiture as currently practiced and promote the public's respect for the rule of law.

1. Indiana Does Not Protect "Innocent Owners."

Indiana's forfeiture law applies to all types of property, including currency, vehicles, real and personal property. Ind. Code § 34-24-1-1. The statute reaches criminal proceeds and instrumentalities of crimes. The statute reaches all vehicles that are "used or [] intended for use . . . to transport or in any manner to facilitate the transportation of" various schedule I, II, III, IV and V controlled substances. Ind. Code § 34-24-1-1(a)(1). The Code authorizes the forfeiture of "[r]eal property owned by a person who uses it to commit any" of a long list of enumerated felonies including dealing in schedule I, II, III, and IV controlled substances. Section 34-24-1-1(d) creates a statutory presumption that money found near a person engaged in drug transactions is *prima facie* subject to forfeiture:

> money found on or near a person who is committing, attempting to commit, or conspires to commit any of the specifically enumerated

> offenses, is presumed forfeitable – period.

Caudill v. State, 613 N.E.2d 433, 438 (Ind. Ct. App. 1993).

Section 34-24-1-1 is draconian and not countered by any meaningful protection for innocent owners, co-owners and family members, all of whom share a financial stake, ownership and/or control over the property, and face an uphill battle to protect their rights. Indiana's innocent owner provision applies only to forfeitures of vehicles. The sole provision on burden of proof for innocent ownership provides:

> At the hearing, the prosecuting attorney must show by a preponderance of the evidence that the property was within the definition of property subject to seizure under section 1 [IC 34-24-1-1] of this chapter. If the property seized was a vehicle, the prosecuting attorney must also show by a preponderance of the evidence that a person who has an ownership interest of record in the bureau of motor vehicles knew or had reason to know that the vehicle was being used in the commission of the offense.

Ind. Code § 34-24-1-4(a) (emphasis added).[2]

Vehicle owners have the opportunity to assert an innocent owner defense. Owners of real property and currency do not. Judge Barnes, in his dissenting opinion, observed that "Entire family farms are sometimes forfeited based on one family member's conduct, or exorbitant amounts of money are seized." *Timbs*, 62 N.E.3d at 478. Yet, these family members have no ability to challenge the forfeiture in Indiana as innocent owners. Given that real estate is commonly held jointly by family members, innocent owners in Indiana are defenseless and can lose their property to the State. This contrasts sharply with federal forfeiture where courts apply an excessive fines analysis and prohibit the forfeiture of real estate simply due to one family member's criminal activity. *United States v. von Hofe*, 492 F.3d 175, 184 (2d Cir. 2007) (forfeiture of wife's interest in the family home based on husband's marijuana operation was unconstitutional under the Eighth Amendment). *See also United States v. Ferro*, 681 F.3d 1105 (9th Cir. 2012) (rejecting forfeiture of antique gun collection on Eighth Amendment grounds).

The statute provides that after the State forfeits co-owned property, the innocent co-owner can redeem the property by paying the State the value of the wrongdoer's interest. Ind. Code § 34-24-1-5. If the co-owner can make this payment, she/he

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[2] There is a separate innocent owner provision for forfeiture of vehicles involved in DWI offenses. § 34-24-1-1(e).

can recover the property free and clear. This provision only applies to owners who did not know about the criminal conduct.

This Court has struggled with the rights of innocent owners and has affirmed forfeitures of their property. *Van Oster v. Kansas*, 272 U.S. 465 (1926) (forfeiture of co-owned vehicle); *Dobbins's Distillery v. United States*, 96 U.S. 395, 401 (1878) (forfeiture of real estate used improperly by lessee). More recently, in *Bennis v. Michigan*, 516 U.S. 442 (1996), the Court confronted forfeitures more akin to the types Amici observe, namely adjudicating a claim filed by a family member at risk of losing property because of a loved one's crimes. In *Bennis*, the claimant's vehicle was forfeited under Michigan's nuisance law because the claimant's husband used the car to solicit a prostitute and engaged in sex inside of the vehicle. There was no dispute that the husband was not authorized to use the vehicle for this purpose and no evidence existed that the claimant knew or should have known of his conduct. The Michigan Supreme Court nevertheless upheld the forfeiture and this Court affirmed. Chief Justice Rehnquist recognized the absence of fundamental unfairness in that case:

> At bottom, petitioner's claims depend on an argument that the Michigan forfeiture statute is unfair because it relieves prosecutors from the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners.

> This argument, in the abstract, has considerable appeal . . . Its force is reduced in the instant case, however, by the Michigan Supreme Court's confirmation of the trial court's remedial discretion . . . and petitioner's recognition that Michigan may forfeit her and her husband's car whether or not she is entitled to an offset for her interest in it...

Id. at 453. Justice Thomas wrote a concurring opinion, joined by Justice Ginsburg, which identified the randomness of the risks to the innocent owner that are posed by forfeiture laws:

> The limits on <u>what</u> property can be forfeited as a result of what wrongdoing -- for example, what it means to "use" property in crime for purposes of forfeiture law -- are not clear to me...Those limits, whatever they may be, become especially significant when they are the sole restrictions on the state's ability to take property from those it merely suspects, or does not even suspect, of colluding in crime.
>
> . . .
>
> Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from

> innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice. When the property sought to be forfeited has been entrusted by its owner to one who uses it for crime, however, the Constitution apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding that result.

Id. at 455 & 456-457 (citation omitted) (emphasis in original).

Indiana affords no protection for innocent owners of real property and minimal protections for innocent owners of vehicles. A meaningful opportunity to mitigate harm to innocent owners should be a necessary element of any forfeiture proceeding. Permitting claimants to raise a defense under the Eighth Amendment's Excessive Fines Clause is particularly important in Indiana which denies an innocent owner so many other basic legal protections.

2. Indiana Does Not Permit Jury Trials for Civil Forfeiture

Indiana denies claimants the right to a jury trial. Amici are not asking this Court to decide

whether this core right should be incorporated. Amici simply wish to inform the Court that this fundamental right is not available to claimants in Indiana, unlike in the vast majority of states.

"The right to have a jury make the ultimate determination of guilt has an impressive pedigree." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). It dates back centuries:

> The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.

Duncan v. Louisiana, 391 U.S. 145, 151 (1968) (footnotes omitted). While this Court has held that forfeiture is punitive, *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), it retains a civil character. A claimant has the right under the Seventh Amendment to a jury trial in a civil forfeiture proceeding. *United States v. One 1976 Mercedes*

Benz, 618 F.2d 453, 454-469 (7th Cir. 1980). The court of appeals in *One 1976 Mercedes Benz* focused on the dichotomy between forfeitures under maritime law and those brought "on land" where jury trials were always permitted and traced the right to a jury trial in civil forfeiture back to 1791, commenting that "[i]t is difficult to imagine how a proceeding to enforce a statutory forfeiture can resemble in any respect a suit in equity." *Id.*, 458-459. The court noted that this proposition was first articulated by Justice Marshal (*id.* (quoting *The Sarah*, 21 U.S. (8 Wheat.) 391, 394, 5 L. Ed. 644 (1823))), and that the right remained enshrined in the law, citing *Rogers v. Loether*, 467 F.2d 1110, 1123 n. 44 (7th Cir. 1972) (Stevens, J.) ("Except in admiralty, forfeiture cases are triable to a jury."), *aff'd sub nom, Curtis v. Loether*, 415 U.S. 189 (1974).

This historical trend clashes with Hoosier jurisprudence. The Seventh Amendment right to a jury trial is not incorporated into the Bill of Rights. *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010). Absent a state constitutional provision, legislation by the Indiana legislature, or a decision by the Indiana courts, Hoosiers do not have a right to a jury trial. The Indiana Bill of Rights which grants trials by jury has not been extended to forfeiture. *See* Ind. Constitution, Article I, Section 20. The Indiana Supreme Court held more than a 100 years ago that there is no right to a jury because forfeiture is a statutory proceeding. *Campbell v. State*, 87 N.E. 212, 215 (1909).

The Indiana Court of Appeals revisited the issue 90 years later:

> [W]e think that the forfeiture of vehicles, money, personal assets, and other property serves remedial, non-punitive purposes. One is creating an economic disincentive to engage in proscribed behavior by subjecting to forfeiture those items "traceable" to criminal activity. By denying individuals the ability to profit from ill-gotten gain, an action for forfeiture resembles an equitable action for disgourgement [sic] or restitution. In addition, by allowing law enforcement officials to recoup the cost of drug operations from the proceeds of forfeited items, the statute helps to finance the State's legitimate interest in enforcing its anti-drug-trafficking laws. Given these remedial purposes, we do not think that the sometimes harsh effects of I.C. 34-4-30.1 override our conclusion that the General Assembly intended this as a civil action.

Caudill v State, 613 N.E.2d 433, 437 (Ind. Ct. App. 1993).

The right to a jury trial is a common protection for property owners in other states but not in Indiana. Indiana extends the right to a jury trial to nearly all other actions brought by the State.

See, e.g., Schumm v. State, 886 N.E.2d 781, 786-90 (Ind. Ct. App. 2007) (reversing judgment on a *Batson* challenge in a case involving a traffic infraction citation for operating a vehicle with improper tail lights).

III. Indiana's "Policing for Profit" Violates the Due Process Clause.

Where a law enforcement agency's priorities and actions are influenced, if not driven, by the revenue that it expects to receive from forfeitures, there is a substantial likelihood that the entire forfeiture program violates the Fourteenth Amendment's Due Process Clause. This Court has provided guidance on when a prosecutor or his office has a financial interest in the outcome of a penalty-based proceeding. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980), the Court rejected a claim that the Due Process Clause was violated where 1% of an agency's budget consisted of funds collected from its civil enforcement actions. However, the Court cautioned:

> A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.

Id. at 250. "Policing for profit" occurs when police and prosecutors select cases based on the opportunity to supplement their budgets. Indiana's forfeiture laws have created a program of policing for profit and incorporating the Eighth Amendment's Excessive Fines Clause will help mitigate or eliminate the ill effects of this system.

1. Local Law Enforcement Regularly Violates Its Duties under the Indiana State Constitution

In 1851, the State held a constitutional convention which amended the State Constitution to create a Common School Fund. The relevant provision states:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Ind. Constitution, Article 8, Section 1.

The State Constitution directs that financing for education will be provided by the Common School Fund, which in turn would be funded by several sources including "the fines assessed for breaches of the penal laws of the State; and from all forfeitures which may accrue." Ind. Constitution, Art. 8, § 2; *see also* Ind. Code § 20-42-1-3 ("Sources of Funds"). The Common School Fund operates as an endowment for the permanent financing of public education in Indiana:

> The principal of the Common School fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever.

Ind. Const. Art. 8, § 3 (emphasis added). The fund lends money at favorable interest rates to municipalities for education-related construction projects.

Although the State Constitution provides that all forfeited funds must be deposited into the Common School Fund, the Indiana legislature has ignored this mandate by permitting law enforcement agencies to fund their operations with money raised from the sale of forfeited assets. The Indiana Supreme Court has stated in *dicta* that this process may be unconstitutional. *Serrano v. State*, 946 N.E.2d 1139, 1146 n.3 (2011). That court is

revisiting the issue this year in *Horner v Curry*, 2018 Ind. LEXIS 472 (order transferring jurisdiction, dated June 19, 2018, and denying request for expedited appeal).

Historically, state law enforcement agencies have been permitted to recoup their costs from forfeited assets. Ind. Code § 34-24-1-4(d) (2017). News media reports have claimed that state law enforcement has circumvented the Common School Fund mandate by claiming that the forfeiture proceeds were less than their costs. In 2011, the *Indianapolis Star* reported that "many of the state's 92 counties, including Marion, have been hoarding all of their forfeiture money for years, never sending any to the school fund."[3] The *Indianapolis Star* reported that only:

> five [out of 92] counties submitted any forfeiture money to the Common School Fund from Jan. 1, 2008, to Feb. 25, 2010, according to records provided by the state treasurer's office. The grand total: $99,490.

Id. (bracketed materials added). In 2015, the *Indianapolis Star* reported that Marion County, home to Indianapolis, the largest city in Indiana, kept all forfeited funds for itself and did not deposit

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[3] "Lawmaker wades into forfeiture fight," *The Indianapolis Star*, Jan. 10, 2011 Final Edition.

any funds into the Common School Fund.[4] The article also reported that these funds were used to pay law enforcement costs.

At a 2017 Indiana legislative hearing on forfeiture reform, one local prosecutor admitted to policing for profit:

> I'm not going to hire anybody to do forfeitures to collect money for the State of Indiana. If my office isn't getting money, I'm not going to be able to pay them for that, and—why am I going to do the extra work and not have some benefit that comes out of it?[5]

At another hearing in 2017, the prosecuting attorney for Delaware County acknowledged that forfeiture helps fund law enforcement without raising taxes.[6]

By statute, § 34-24-1-4.5, a prosecuting attorney is required to report on the results of

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[4] "Seized assets," *The Indianapolis Star*, February 22, 2015.

[5] Hrg. of Ind. Senate Corrs. & Crim. Law Comm. (Jan. 10, 2017) (video statement of Rodney J. Cummings, Prosecuting Attorney for Madison County), at 2:27:11–2:27:23, https://tinyurl.com/y9hnzrto.

[6] Hrg. of Ind. Senate Corrs. & Crim. Law Comm., Interim Study Committee (Aug. 16, 2017) (video statement of Jeff Arnold), Prosecuting Attorney for Delaware County), at 23:30:-24:48, http://iga.in.gov/information/archives/2017/video/committee_i_courts_and_the_judiciary_interim_study_committee_on/

forfeiture cases. The statistics in reports for the last two years indicate that only a tiny fraction of forfeiture proceeds is transferred to the Common School Fund:

	Forfeited Cash & Auction Proceeds	Payments to Common School Fund
2016[7]	$1,802,941.44	$31,443.12
2017[8]	$3,394,266.28	$62,952.71

Earlier this year, the legislature enacted Senate Enrolled Act 99 ("SEA 99"), which slightly changed the allocation structure. Previously, municipalities were permitted to determine their costs. Now, municipalities are permitted by law to keep the bulk of the forfeited property.

Section 3 of SEA 99, codified at Ind. Code § 34-24-1-8(d)(3), provides that, after paying a contingency fee to a private attorney, the prosecuting county keeps one-third of the forfeiture to cover its costs. *Id.* Of the remaining funds, 85% is paid to the general fund of the jurisdiction which handled the prosecution. *Id.*

Despite the plain language of the State Constitution, State law still permits law enforcement to keep the bulk of the forfeited

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[7] https://iga.in.gov/legislative/2017/publications/agency/reports/ipac/

[8] https://iga.in.gov/legislative/2017/publications/agency/reports/ipac/#document-c5e83dff

proceeds. As noted above, the Indiana Supreme Court will soon decide if the statute violates Indiana's Constitution.

2. Indiana Has Privatized Civil Forfeiture

The prosecutor's role in forfeiture has been privatized. Many smaller municipalities retain private lawyers to prosecute forfeiture cases on a contingency fee basis. Thus, the prosecuting attorney has a personal financial interest in the outcome of the litigation, thereby bringing "irrelevant or impermissible factors" into the forfeiture. *Marshall*, 446 U.S. at 250.

The most notorious example of prosecuting for forfeiture dollars involved Mark McKinney, a deputy prosecuting attorney in Delaware County whose seat is Muncie. McKinney simultaneously represented the State in the criminal proceedings as a part-time paid employee and prosecuted the civil forfeiture as a part-time contractor on a contingency fee basis:

> Respondent at times engaged in plea agreement negotiations regarding criminal cases with criminal defendants before and/or after Respondent also engaged in ... settlement negotiations regarding related civil forfeiture actions with the same criminal defendants. Respondent did this knowing that he would receive payment as personal

> compensation equaling 25% of the amount transferred as a result of the action.

In re McKinney, 948 N.E.2d 1154, 1157 (2011). The Indiana Supreme Court imposed a 120-day suspension against McKinney.

Earlier this year, the Indiana Legislature enacted the aforementioned forfeiture reform, SEA 99. Section 5 of SEA 99, codified at Ind. Code § 34-24-1-8, makes it mandatory that, if a county retains a private attorney, the county must pay the attorney on a contingency fee basis.[9] The rates of the fee agreement are set forth in the statute which provides a minimum fee of $100 per case and a contingency recovery as follows: one-third of the first $10,000 recovery; 20% of the portion of any recovery that exceeds $10,000 but is less than $100,000, and 15% of any recovery over $100,000. *See* Ind. Code § 34-24-1-8(d). The court may permit the private attorney to seek additional fees over the amounts set by statute. Ind. Code § 34-24-1-8(e).

Between contingency payments to contract lawyers and statutory costs paid to local law enforcement agencies, the Common School Fund keeps about 8% of a $100,000 forfeiture. This statutory amendment is not consistent with

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[9] The statute further provides that publicly-paid prosecutors cannot receive a contingency fee for private forfeiture work. § 34-24-1-8(d). Thus, conflicts like those that occurred in the cases that McKinney handled will not reoccur.

Indiana's State Constitution which mandates that these funds be used to fund public education.

Moreover, the contingency fee structure incentivizes private attorneys to bring lots of small cases. Private lawyers have little incentive to bring larger, more complex forfeitures which can be time consuming; their percentages diminishes as the amount of the recovery increases. In contrast, forfeiture of vehicles tend to be straightforward and more profitable under the statute.

Given that the State keeps nearly all of the forfeited assets to fund its law enforcement budgets and given that private lawyers are improperly incentivized to behave like bounty hunters, Amici urge this Court to hold that the Eighth Amendment's Excessive Fines Clause is incorporated into the Fourteenth Amendment.

CONCLUSION

Indiana's unfair and harsh civil forfeiture scheme suffers from systematic problems including due process deficiencies that strip Hoosiers of time-honored rights. Now, more than ever, Hoosiers need relief from these harsh, profit-driven practices and request protection under the Eighth Amendment to the U.S. Constitution. Amici urge this Court to speak clearly on the invidious effects of forfeiture and overturn the decision of the Indiana Supreme Court. A clear pronouncement on the incorporation of this important right through the Fourteenth Amendment to be free of excessive punishment

will help guide lower courts and the Indiana Legislature.

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No. 17-1091

In the

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2

Petitioners,

v.

STATE OF INDIANA

Respondent.

On Writ of Certiorari
to the Indiana Supreme Court

APPENDIX TO BRIEF OF AMICI CURIAE INDIANA CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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Appendix A: Ind. Code § 34-24-1 *et seq.*
Current through the end of the Special Session of the 120th General Assembly.

34-24-1-1. Property which may be seized.

(a) The following may be seized:
(1) All vehicles (as defined by Ind. Code § 35-31.5-2-346), if they are used or are intended for use by the person or persons in possession of them to transport or in any manner to facilitate the transportation of the following:
(A)A controlled substance for the purpose of committing, attempting to commit, or conspiring to commit any of the following:
(i) Dealing in or manufacturing cocaine or a narcotic drug (Ind. Code § 35-48-4-1).
(ii) Dealing in methamphetamine (Ind. Code § 35-48-4-1.1).
(iii) Manufacturing methamphetamine (Ind. Code § 35-48-4 1.2).
(iv) Dealing in a schedule I, II, or III controlled substance (Ind. Code § 35-48-4-2).
(v) Dealing in a schedule IV controlled substance (Ind. Code § 35-48-4-3).
(vi) Dealing in a schedule V controlled substance (Ind. Code § 35-48-4-4).
(vii) Dealing in a counterfeit substance (Ind. Code § 35-48-4 5).
(viii) Possession of cocaine or a narcotic drug (Ind. Code § 35-48-4-6).
(ix) Possession of methamphetamine (Ind. Code § 35-48-4 6.1).
(x) Dealing in paraphernalia (Ind. Code § 35-48-4-8.5).

(xi)Dealing in marijuana, hash oil, hashish, or salvia (Ind. Code § 35-48-4-10).

(xii)Dealing in a synthetic drug or synthetic drug lookalike substance (Ind. Code § 35-48-4-10.5, or Ind. Code § 35-48-4-10 before its amendment in 2013).

(B)Any stolen (Ind. Code § 35-43-4-2) or converted property (Ind. Code § 35-43-4-3) if the retail or repurchase value of that property is one hundred dollars ($100) or more.

(C)Any hazardous waste in violation of Ind. Code § 13-30-10-1.5.

(D)A bomb (as defined in Ind. Code § 35-31.5-2-31) or weapon of mass destruction (as defined in Ind. Code § 35-31.5-2-354) used to commit, used in an attempt to commit, or used in a conspiracy to commit an offense under Ind. Code § 35-47 as part of or in furtherance of an act of terrorism (as defined by Ind. Code § 35-31.5-2-329).

(2)All money, negotiable instruments, securities, weapons, communications devices, or any property used to commit, used in an attempt to commit, or used in a conspiracy to commit an offense under Ind. Code § 35-47 as part of or in furtherance of an act of terrorism or commonly used as consideration for a violation of Ind. Code § 35-48-4 (other than items subject to forfeiture under Ind. Code § 16-42-20-5 or Ind. Code § 16-6-8.5-5.1, before its repeal):

(A)furnished or intended to be furnished by any person in exchange for an act that is in violation of a criminal statute;

(B)used to facilitate any violation of a criminal statute; or

(C)traceable as proceeds of the violation of a criminal statute.

(3)Any portion of real or personal property purchased with money that is traceable as a proceed of a violation of a criminal statute.

(4)A vehicle that is used by a person to:

(A)commit, attempt to commit, or conspire to commit;

(B)facilitate the commission of; or

(C)escape from the commission of; murder (Ind. Code § 35-42-1-1), dealing in a controlled substance resulting in death (Ind. Code § 35-42-1-1.5), kidnapping (Ind. Code § 35-42-3-2), criminal confinement (Ind. Code § 35-42-3-3), rape (Ind. Code § 35-42-4-1), child molesting (Ind. Code § 35-42-4-3), or child exploitation (Ind. Code § 35-42-4-4), or an offense under Ind. Code § 35-47 as part of or in furtherance of an act of terrorism.

(5)Real property owned by a person who uses it to commit any of the following as a Level 1, Level 2, Level 3, Level 4, or Level 5 felony:

(A)Dealing in or manufacturing cocaine or a narcotic drug (Ind. Code § 35-48-4-1).

(B)Dealing in methamphetamine (Ind. Code § 35-48-4-1.1).

(C)Manufacturing methamphetamine (Ind. Code § 35-48-4-1.2).

(D)Dealing in a schedule I, II, or III controlled substance (Ind. Code § 35-48-4-2).

(E)Dealing in a schedule IV controlled substance (Ind. Code § 35-48-4-3).

(F)Dealing in marijuana, hash oil, hashish, or salvia (Ind. Code § 35-48-4-10).

(G) Dealing in a synthetic drug or synthetic drug lookalike substance (Ind. Code § 35-48-4-10.5, or Ind. Code § 35-48-4-10 before its amendment in 2013).

(H) Dealing in a controlled substance resulting in death (Ind. Code § 35-42-1-1.5).

(6) Equipment and recordings used by a person to commit fraud under Ind. Code § 35-43-5- 4(10).

(7) Recordings sold, rented, transported, or possessed by a person in violation of Ind. Code § 24- 4-10.

(8) Property (as defined by Ind. Code § 35-31.5-2-253) or an enterprise (as defined by Ind. Code § 35-45- 6-1) that is the object of a corrupt business influence violation (Ind. Code § 35-45-6-2).

(9) Unlawful telecommunications devices (as defined in Ind. Code § 35-45-13-6) and plans, instructions, or publications used to commit an offense under Ind. Code § 35-45-13.

(10) Any equipment, including computer equipment and cellular telephones, used for or intended for use in preparing, photographing, recording, videotaping, digitizing, printing, copying, or disseminating matter in violation of Ind. Code § 35-42-4.

(11) Destructive devices used, possessed, transported, or sold in violation of Ind. Code § 35-47.5.

(12) Tobacco products that are sold in violation of Ind. Code § 24-3-5, tobacco products that a person attempts to sell in violation of Ind. Code § 24-3-5, and other personal property owned and used by a person to facilitate a violation of Ind. Code § 24-3-5.

(13) Property used by a person to commit counterfeiting or forgery in violation of Ind. Code § 35-43-5-2.

(14) After December 31, 2005, if a person is convicted of an offense specified in Ind. Code § 25-26-14-26(b) or Ind. Code § 35-43-10, the following real or personal property:

(A) Property used or intended to be used to commit, facilitate, or promote the commission of the offense.

(B) Property constituting, derived from, or traceable to the gross proceeds that the person obtained directly or indirectly as a result of the offense.

(15) Except as provided in subsection (e), a vehicle used by a person who operates the vehicle:

(A)while intoxicated, in violation of Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5, if in the previous five (5) years the person has two (2) or more prior unrelated convictions:

(i)for operating a motor vehicle while intoxicated in violation of Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5; or

(ii)for an offense that is substantially similar to Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5

in another jurisdiction; or

(B)on a highway while the person's driving privileges are suspended in violation of Ind. Code § 9-24-19-2 through Ind. Code § 9-24-19-3, if in the previous five (5) years the person has two (2) or more prior unrelated convictions:

(i)for operating a vehicle while intoxicated in violation of Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5; or

(ii)for an offense that is substantially similar to Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5 in another jurisdiction. If a court orders the seizure of a vehicle under this subdivision, the court shall transmit an order to the bureau of motor vehicles recommending that the bureau not permit a vehicle to be registered in the name of the person whose vehicle was seized until the person possesses a current driving license (as defined in Ind. Code § 9-13-2-41).

(16)The following real or personal property:

(A)Property used or intended to be used to commit, facilitate, or promote the commission of an offense specified in Ind. Code § 23-14-48-9, Ind. Code § 30-2-9-7(b), Ind. Code § 30-2-10-9(b), or Ind. Code § 30-2-13-38(f).

(B)Property constituting, derived from, or traceable to the gross proceeds that a person obtains directly or indirectly as a result of an offense specified in Ind. Code § 23-14-48-9, Ind. Code § 30-2-9-7(b), Ind. Code § 30-2-10-9(b), or Ind. Code § 30-2-13-38(f).

(17)An automated sales suppression device (as defined in Ind. Code § 35-43-5-4.6(a)(1) or phantom-ware (as defined in Ind. Code § 35-43-5-4.6(a)(3)).

(18)Real or personal property, including a vehicle, that is used by a person to:

(A)commit, attempt to commit, or conspire to commit;

(B)facilitate the commission of; or

(C)escape from the commission of; a violation of Ind. Code § 35-42-3.5-1 through Ind. Code § 35-

42-3.5-1.4 (human trafficking) or Ind. Code § 35-45-4-4 (promoting prostitution).

(b)A vehicle used by any person as a common or contract carrier in the transaction of business as a common or contract carrier is not subject to seizure under this section, unless it can be proven by a preponderance of the evidence that the owner of the vehicle knowingly permitted the vehicle to be used to engage in conduct that subjects it to seizure under subsection (a).

(c) Equipment under subsection (a)(10) may not be seized unless it can be proven by a preponderance of the evidence that the owner of the equipment knowingly permitted the equipment to be used to engage in conduct that subjects it to seizure under subsection (a)(10).

(d) Money, negotiable instruments, securities, weapons, communications devices, or any property commonly used as consideration for a violation of Ind. Code § 35-48-4 found near or on a person who is committing, attempting to commit, or conspiring to commit any of the following offenses shall be admitted into evidence in an action under this chapter as prima facie evidence that the money, negotiable instrument, security, or other thing of value is property that has been used or was to have been used to facilitate the violation of a criminal statute or is the proceeds of the violation of a criminal statute:

(1) Ind. Code § 35-42-1-1.5 (dealing in a controlled substance resulting in death).

(2) Ind. Code § 35-48-4-1 (dealing in or manufacturing cocaine or a narcotic drug).

(3) Ind. Code § 35-48-4-1.1 (dealing in methamphetamine).

(4) Ind. Code § 35-48-4-1.2 (manufacturing methamphetamine).
(5) Ind. Code § 35-48-4-2 (dealing in a schedule I, II, or III controlled substance).
(6) Ind. Code § 35-48-4-3 (dealing in a schedule IV controlled substance).
(7) Ind. Code § 35-48-4-4 (dealing in a schedule V controlled substance) as a Level 4 felony.
(8) Ind. Code § 35-48-4-6 (possession of cocaine or a narcotic drug) as a Level 3, Level 4, or Level 5 felony.
(9) Ind. Code § 35-48-4-6.1 (possession of methamphetamine) as a Level 3, Level 4, or Level 5 felony.
(10) Ind. Code § 35-48-4-10 (dealing in marijuana, hash oil, hashish, or salvia) as a Level 5 felony.
(11) Ind. Code § 35-48-4-10.5 (dealing in a synthetic drug or synthetic drug lookalike substance) as a Level 5 felony or Level 6 felony (or as a Class C felony or Class D felony under Ind. Code § 35-48-4-10 before its amendment in 2013).

(e)A vehicle operated by a person who is not:
(1)an owner of the vehicle; or
(2)the spouse of the person who owns the vehicle;
is not subject to seizure under subsection (a)(15) unless it can be proven by a preponderance of the evidence that the owner of the vehicle knowingly permitted the vehicle to be used to engage in conduct that subjects it to seizure under subsection (a)(15).

34-24-1-2. Procedure upon seizure.

(a) Property may be seized under this chapter by a law enforcement officer only if:

(1)the seizure is incident to a lawful:

(A)arrest;

(B)search; or

(C)administrative inspection;

(2)the property has been the subject of a prior judgment in favor of the state or unit in a proceeding under this chapter (or Ind. Code § 34-4-30.1 before its repeal); or

(3)a court, after making an ex parte determination that there is probable cause to believe the property is subject to seizure under this chapter, issues an order for seizure.

(b) If property is seized under subsection (a)(1), the prosecuting attorney shall file an affidavit of probable cause with a circuit or superior court in the county in which the seizure occurred not later than seven (7) days after the date of the seizure. If the court does not find probable cause to believe the property is subject to seizure under this chapter, it shall order the property returned to the owner of record.

(c) When property is seized under subsection (a), the law enforcement agency making the seizure may, pending final disposition:

(1)place the property under seal;

(2)remove the property to a place designated by the court; or

(3)require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(d)If property seized under subsection (a)(1) or (a)(3) is real property or a vehicle operated or possessed at the time of its seizure by a person who is not an owner of the real property or vehicle, the owner of the real property or vehicle may file a verified petition for provisional release pending final forfeiture determination, requesting the court to grant the owner possession of the real property or vehicle while the forfeiture action is pending.

(e)A petition for provisional release under this section must:

(1)be in writing;

(2)be verified by the petitioner;

(3)state the grounds for relief;

(4)be filed in a circuit or superior court in the county in which the seizure occurred; and

(5)be served on the prosecuting attorney.

(f)At the hearing on the petition for provisional release under this section, the petitioner must establish that the:

(1)petitioner is an owner of record;

(2)petitioner or the petitioner's family benefits from the use of the vehicle or the real property;

(3)petitioner has insured the property against loss from accident and casualty; and

(4)petitioner had no reason to believe that the vehicle or real property would be used for illegal activity.

(g)At the hearing on the petition for provisional release under this section, the prosecuting attorney may present evidence that returning the property to the owner would likely result in:

(1)damage to the property or diminution of the value of the property beyond ordinary wear and tear; or

(2)continued use of the property in connection with illegal activity.

(h)If the court grants the petition for provisional release under this section, the court shall require the owner to:

(1)maintain the property; and

(2)refrain from selling or otherwise conveying the property without the permission of the prosecuting attorney.

(i)If the court grants the petition for provisional release under this section, it may place reasonable restrictions on the use of the property, including one (1) or more of the following:

(1)Requiring the owner to post a cash bond.

(2)Placing mileage limitations on the use of a vehicle.

(3)Imposing reasonable limits on the use of the property.

(4)Prohibiting certain persons from the possession, occupation, or use of the property.

(5)Requiring payment of all taxes, registration, and other fees, if applicable.

(6)Maintaining property, casualty, and accident insurance.

(j)A court may not grant a petition for provisional release under this section if the prosecuting attorney has filed a motion under section 9 [Ind. Code § 34-24-1-9] of this chapter or Ind. Code § 35-33-5-5(j).

(k)The prosecuting attorney shall notify the owner of record of a vehicle or real property of the right to file a petition for provisional release under this section not later than seven (7) days after probable cause has been determined under subsection (b).

(l)Property that is seized under subsection (a) (or Ind. Code § 34-4-30.1-2(a) before its repeal) is not

subject to replevin but is considered to be in the custody of the law enforcement agency making the seizure.

34-24-1-3. Demand for return — Recovery of law enforcement costs.

(a) The prosecuting attorney for the county in which the seizure occurs may, within twenty-one (21) days after receiving written notice from the owner demanding return of the seized property or within ninety (90) days after the property is seized, whichever occurs first, cause an action for forfeiture to be brought by filing a complaint in the circuit or superior court in the jurisdiction where the seizure occurred. The action must be brought:

(1)in the name of the state; and

(2)within the period that a prosecution may be commenced under Ind. Code § 35-41-4-2 for the offense that is the basis for the seizure.

(b) If the property seized was a vehicle or real property, the prosecuting attorney shall serve, under the Indiana Rules of Trial Procedure, a copy of the complaint upon each person whose right, title, or interest is of record in the bureau of motor vehicles, in the county recorder's office, or other office authorized to receive or record vehicle or real property ownership interests.

(c) If, after the expiration of the twenty-one (21) or ninety (90) day period described in subsection (a), the prosecuting attorney has not filed a complaint initiating an action for forfeiture, the property shall be returned immediately to the owner, or to a lienholder or bona fide purchaser for value. If the property is returned without a complaint for forfeiture having been filed, the owner, lienholder, or bona fide purchaser for value is not liable for any costs or fees incurred in storing, transporting, or maintaining the property.

(d) The owner of the seized property, or any person whose right, title, or interest is of record may, within twenty (20) days after service of the complaint under the Indiana Rules of Trial Procedure, file an answer to the complaint and may appear at the hearing on the action.

(e) If, at the end of the time allotted for an answer, there is no answer on file, the court, upon motion, shall enter judgment in favor of the state and shall order the property disposed of in accordance with section 4 [Ind. Code § 34-24-1-4] of this chapter.

34-24-1-4. Burden of proof — Judgment.

(a) At the hearing, the prosecuting attorney must show by a preponderance of the evidence that the property was within the definition of property subject to seizure under section 1 [Ind. Code § 34-24-1-1] of this chapter. If the property seized was a vehicle, the prosecuting attorney must also show by a preponderance of the evidence that a person who has an ownership interest of record in the bureau of motor vehicles knew or had reason to know that the vehicle was being used in the commission of the offense.

(b) If the prosecuting attorney fails to meet the burden of proof, the court shall order the property released to the owner, unless the owner's possession of the property is illegal. If property is released to the owner under this subsection, the owner is not subject to or responsible for any charges for storage of the property or other expenses incurred in the preservation of the property.

(c) If the court enters judgment in favor of the state, the court, subject to section 5 [Ind. Code § 34-24-1-5] of this chapter, shall order distribution of the property in accordance with subsection (d). The court's order may permit the law enforcement agency to use the property for a period not to exceed three (3) years. However, the order must require that, after the period specified by the court, the law enforcement agency shall deliver the property to the county sheriff for public sale.

(d) If the court enters judgment in favor of the state, the court shall, subject to section 5 of this chapter order that:

(1)the property, if it is not money or real property, be sold under section 6 [Ind. Code § 34-24-1-6] of this chapter, by the sheriff of the county in which the property was seized, and if the property is a vehicle, this sale must occur after any period of use specified in subsection (c);
(2)the property, if it is real property, be sold in the same manner as real property is sold on execution under Ind. Code § 34-55-6; and
(3)the proceeds of the sale or the money be distributed as follows:

(A)To pay attorney's fees, if outside counsel is employed under section 8 [Ind. Code § 34-24-1-8] of this chapter.
(B)After payment of attorney's fees under clause (A), one third (1/3) of the remaining amount shall be deposited into the forfeiture fund established by the prosecuting attorney to offset expenses incurred in connection with the investigation and prosecution of the action.
(C)Except as provided in clause (D), after distribution of the proceeds described in clauses (A) and (B), if applicable, eighty-five percent (85%) of the remaining proceeds shall be deposited in the:

(i)general fund of the state;
(ii)general fund of the unit that employed the law enforcement officers that seized the property; or
(iii)county law enforcement fund established for the support of the drug task force; as determined by the court, to offset expenses incurred in the investigation of the acts giving rise to the action.

(D)After distribution of the proceeds described in clauses (A) and (B), if applicable, eighty-five percent (85%) of the remaining proceeds shall be deposited in the general fund of a unit if the property was seized by a local law enforcement agency of the unit for an offense, an attempted offense, or a conspiracy to commit an offense under Ind. Code § 35-47 as part of or in furtherance of an act of terrorism. The court shall order that the proceeds remaining after the distribution of funds to offset expenses described in subdivision (3) be forfeited and transferred to the treasurer of state for deposit in the common school fund.

(e)If property that is seized under this chapter (or Ind. Code § 34-4-30.1-4 before its repeal) is transferred:

(1)after its seizure, but before an action is filed under section 3 [Ind. Code § 34-24-1-3] of this chapter (or Ind. Code § 34-4-30.1-3 before its repeal); or

(2)when an action filed under section 3 of this chapter (or Ind. Code § 34-4-30.1-3 before its repeal) is pending; the person to whom the property is transferred must establish an ownership interest of record as a bona fide purchaser for value. A person is a bona fide purchaser for value under this section if the person, at the time of the transfer, did not have reasonable cause to believe that the property was subject to forfeiture under this chapter.

(f)If the property seized was an unlawful telecommunications device (as defined in Ind. Code § 35-45-

13-6) or plans, instructions, or publications used to commit an offense under Ind. Code § 35-45-13, the court may order the sheriff of the county in which the person was convicted of an offense under Ind. Code § 35-45-13 to destroy as contraband or to otherwise lawfully dispose of the property.

34-24-1-4.5. Prosecuting attorney's reports.

(a) After a prosecuting attorney files a forfeiture action, the prosecuting attorney shall report the following to the Indiana prosecuting attorneys council:

(1) The date the property was seized.

(2) Whether the property seized was cash, a vehicle, real property, or other personal property.

(3) Whether the forfeiture was filed in state court or through federal adoptive seizure. This subsection applies even if the prosecuting attorney has retained an attorney to bring the forfeiture action.

(b) After a court enters a judgment in favor of the state or a unit under section 4 [Ind. Code § 34-24-1-4] of this chapter, the prosecuting attorney shall report the following to the Indiana prosecuting attorneys council:

(1) The amount of money or property that is the subject of the judgment.

(2) The law enforcement agency to which the money or property is ordered to be transferred.

(3) Whether the forfeiture was contested.

(4) Whether an innocent owner made a claim to the property.

(5) Whether the final disposition of the property resulted in the property being returned, destroyed, forfeited, retained, or distributed by settlement.

(6) The date of the final disposition. This subsection applies even if the prosecuting attorney has retained an attorney to bring an action under this chapter.

(c) After a court, upon motion of the prosecuting attorney under Ind. Code § 35-33-5-5(j), orders property transferred to a federal authority for disposition under 18 U.S.C. 981(e), 19 U.S.C. 1616a, or 21 U.S.C. 881(e), and any related regulations adopted by the United States Department of Justice, the prosecuting attorney shall report to the Indiana prosecuting attorneys council the amount of money or property transferred. This subsection applies even if the prosecuting attorney has retained an attorney to bring an action under this chapter.

(d)A report made to the Indiana prosecuting attorneys council under this section must be in a format approved by the prosecuting attorneys council. A prosecuting attorney with no forfeitures to report shall file a report with the Indiana prosecuting attorneys council.

34-24-1-5. Secured interests — Co-owner of property.

(a) If:

(1)the court has entered judgment in favor of the state, and a unit (if appropriate) concerning property that is subject to seizure under this chapter; and

(2)a person:

(A)holding a valid lien, mortgage, security interest, or interest under a conditional sales contract; or

(B)who is a co-owner of the property;

did not know of the illegal use; the court shall determine whether the secured interest or the co-owner's interest is equal to or in excess of the appraised value of the property.

(b) Appraised value is to be determined as of the date of judgment on a wholesale basis by:

(1)agreement between the secured party or the co-owner and the prosecuting attorney; or

(2)the county assessor for the county in which the action is brought.

(c) If the amount:

(1)due to the secured party; or

(2)of the co-owner's interest; is equal to or greater than the appraised value of the property, the court shall order the property released to the secured party or the co-owner.

(d) If the amount:

(1)due the secured party; or

(2)of the co-owner's interest; is less than the appraised value of the property, the holder of the interest or the co-owner may pay into the court an amount equal to the owner's equity, which shall

be the difference between the appraised value and the amount of the lien, mortgage, security interest, interest under a conditional sales contract, or co-owner's interest. Upon such payment, the state or unit, or both, shall relinquish all claims to the property, and the court shall order the payment deposited as provided in section 4(d) [Ind. Code § 34-24-1-4(d)] of this chapter.

(e)If the seized property is a vehicle and if the security holder or the co-owner elects not to make payment as stated in subsection (d), the vehicle shall be disposed of in accordance with section 4(c) [Ind. Code § 34-24-1-4(c)] of this chapter.

34-24-1-6. Public sale.

(a) Where disposition of property is to be made at a public sale, notice of sale shall be published in accordance with Ind. Code § 34-55-6.
(b) When property is sold at a public sale under this chapter, the proceeds shall be distributed in the following order:
(1) First, to the sheriff of the county for all expenditures made or incurred in connection with the sale, including storage, transportation, and necessary repair.
(2) Second, to any person:
(A)holding a valid lien, mortgage, land contract, or interest under a conditional sales contract or the holder of other such interest; or
(B)who is a co-owner and has an ownership interest; up to the amount of that person's interest as determined by the court.
(3) The remainder, if any, shall be transferred by the sheriff to the appropriate fund as ordered by the court in section 4(d) [Ind. Code § 34-24-1-4(d)] of this chapter.

34-24-1-7. Filing of court order — Vehicle — Real property.

(a) If the property seized was a vehicle, a copy of the court's order under this chapter (or Ind. Code § 34-4-30.1-7 before its repeal):
(1)shall be filed with the department of motor vehicles or other appropriate agency; and
(2)constitutes authority for the issuance of clear title to that vehicle in the name of the person or purchaser to whom the order authorizes delivery.
(b) If the property seized was real property, a copy of the court's order under this chapter (or Ind. Code § 34-4-30.1-7 before its repeal):
(1)shall be filed with the county recorder; and
(2)constitutes authority for:
(A)the sale of the property in the manner provided under Ind. Code § 34-55-6; and
(B)the issuance of clear title to a bona fide purchaser for value who acquires the real property at the sale.

34-24-1-8. Attorney retained to assist prosecuting attorney.

(a)A prosecuting attorney may retain an attorney to bring an action under this chapter only in accordance with this section.
(b) The compensation agreement between a prosecuting attorney and an attorney retained to bring an action under this chapter must be:
(1)in writing; and
(2)approved by the attorney general for form and legality.
(c) An attorney retained under this section must be admitted to the practice of law in Indiana. The attorney retained may not serve as a deputy prosecuting attorney in any county.
(d)A prosecuting attorney or deputy prosecuting attorney who conducts a forfeiture action within the scope of the attorney's duties as a prosecuting attorney or deputy prosecuting attorney in the prosecuting attorney's office may not receive a contingency fee.
(e)A compensation agreement under this section must be a contingency fee agreement limited as follows:
(1) The contingency fee may not exceed thirty-three and one-third percent (33 1/3%) of the first ten thousand dollars ($10,000) of proceeds or money obtained under a settlement or judgment.
(2) The contingency fee may not exceed twenty percent (20%) of the part of the proceeds or money obtained under a settlement or judgment that is more than ten

thousand dollars ($10,000) and less than one hundred thousand dollars ($100,000).

(3)The contingency fee may not exceed fifteen percent (15%) of the part of the proceeds or money obtained under a settlement or judgment that is one hundred thousand dollars ($100,000) or more.

(4)The contingency fee agreement may establish a minimum fee that does not exceed one hundred dollars ($100).

A court may authorize a compensation agreement between the prosecuting attorney and an attorney retained to bring an action that exceeds the limits described in this subsection if the court finds that the issues presented in the particular forfeiture action are unusually complex or time consuming as compared with other forfeiture actions.

34-24-1-9. Transfer to federal authority — Disposition and use of money.

(a) Upon motion of a prosecuting attorney under Ind. Code § 35-33-5-5(j), property seized under this chapter must be transferred, subject to the perfected liens or other security interests of any person in the property, to the appropriate federal authority for disposition under 18 U.S.C. § 981(e), 19 U.S.C. § 1616a, or 21 U.S.C. § 881(e) and any related regulations adopted by the United States Department of Justice.

(b) Money received by a law enforcement agency as a result of a forfeiture under 18 U.S.C. § 981(e), 19 U.S.C. § 1616a, or 21 U.S.C. § 881(e) and any related regulations adopted by the United States Department of Justice must be deposited into a nonreverting fund and may be expended only with the approval of:

(1)the executive (as defined in Ind. Code § 36-1-2-5), if the money is received by a local law enforcement agency; or

(2)the governor, if the money is received by a law enforcement agency in the executive branch.

The money received under this subsection must be used solely for the benefit of any agency directly participating in the seizure or forfeiture for purposes consistent with federal laws and regulations.

No. 17-1091

In The
Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ Of *Certiorari*
To The Indiana Supreme Court

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization that works to protect and defend the rights to free speech, assembly, press, and petition. As part of that mission, the Institute represents individuals and civil society organizations, *pro bono*, in cases raising First Amendment objections to the regulation of core political activity. The Institute's clients often face burdensome civil fines for even minor technical violations of these laws.

In addition, the Institute has participated as *amicus curiae* in many of this Court's most important First Amendment cases, including *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014), *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Last Term, the Institute also participated as *amicus curiae* to address the First Amendment implications of *Carpenter v. United States*, 585 U.S. __; 138 S. Ct. 2206 (2018), and the political speech questions raised by *Lozman v. City of Riviera Beach*, 585 U.S. __, 138 S. Ct. 1945 (2018).

SUMMARY OF THE ARGUMENT

The Bill of Rights protects discrete, enumerated liberties. But it also protects "our scheme of ordered liberty" by serving the Constitution's

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. Both Parties have filed blanket consent to briefs of *amicus curiae* in this case.

larger, interlocking machinery. *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010) (emphasis removed). Accordingly, when deciding whether to incorporate one of its protections against the States, this Court should consider the effect on other enumerated rights.

Here, incorporating the Excessive Fines Clause will bolster the rights protected by the First Amendment. That is because state regulators have threatened outrageous fines for even minor, technical violations of campaign finance provisions. As a result, the threat of excessive fines itself works to chill protected expression.

This is troubling because courts cannot directly address the fines themselves. Instead, until this Court incorporates the Excessive Fines Clause, they must take a detour through the hopelessly complex law governing campaign finance, choosing among and applying the mosaic of standards articulated by this Court in the First Amendment context. That approach is inefficient and fails to provide the protections clearly anticipated by the Eighth Amendment's text.

ARGUMENT

I. This Court ought to consider the positive effects incorporation of the Excessive Fines Clause will have on speech and association protected by the First Amendment.

"The first ten amendments were proposed and adopted largely because of fear that [the Federal] Government might unduly interfere with prized

individual liberties," and, accordingly, "[t]he amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments." *Adamson v. Calif.*, 332 U.S. 46, 70 (1947) (Black, J., dissenting).

These amendments operate together, protecting a "scheme of ordered liberty." *McDonald*, 561 U.S. at 764. [2] For example, the Fourth Amendment requires the government to obtain a warrant before installing a GPS tracker, and that requirement can in turn prevent the police from infringing on an individual's First Amendment right to privacy in "her familial, political, professional, religious, and sexual associations." *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring); *see also NAACP v. Ala.*, 357 U.S. 449, 466 (1958) (First Amendment protects "the right...to pursue [one's] lawful private interests privately and to associate freely with others in so doing").

But as mere "checks and limitations upon the government which that instrument called into existence," those amendments had no effect "on...the States, which existed when the Constitution was adopted." *Slaughter-House Cases*, 83 U.S. 36, 124 (1873) (Swayne, J., dissenting). After a long train of abuses necessitated "a new Magna Charta," the People adopted the Fourteenth Amendment. *Id.* at 125. As presently understood by this Court, that article may "prevent[] state invasion of rights

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[2] While Justice Alito's justification of the Court's judgment was a plurality opinion, his explanation of the how rights are incorporated under the Fourteenth Amendment commanded a majority of the Court.

enumerated in the first eight Amendments," *Malloy v. Hogan*, 378 U.S. 1, 4 (1964), where "a particular Bill of Rights guarantee is fundamental to" the American "scheme of ordered liberty and system of justice." *McDonald*, 561 U.S. at 764.

When considering whether a clause of the Bill of Rights is "fundamental to our scheme of ordered liberty," *id.* (emphasis removed), the Court should not treat that particular provision in a vacuum. Instead, it should consider whether it might also provide a constitutional prophylaxis protecting other freedoms essential to that order. *See Mapp v. Ohio*, 367 U.S. 643, 657 (1961) ("The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence...").

Such is the case here: incorporation of the Excessive Fines Clause will also protect against State action threatening political activity, a context where "the First Amendment 'has its fullest and most urgent application.'" *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

II. Incorporation of the Excessive Fines Clause will provide additional security for rights guaranteed by the First Amendment.

Although the First Amendment protects political speech and association, those rights are "not absolute." *McCutcheon*, 572 U.S. at 191 (Roberts, C.J., controlling op.). Accordingly, the federal government and the States have imposed various restrictions on political freedom, including the ability to finance

political campaigns and make electoral communications.

The First Amendment applies at all levels of government. *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925); *De Jonge v. Or.*, 299 U.S. 353, 364 (1937); *NAACP*, 357 U.S. at 466. But while Congress is bound by the Eighth Amendment, unless this Court rules for Petitioners, the States will not be so encumbered.

This is not an ephemeral concern. Penalties that would appear to implicate the Excessive Fines Clause are already being imposed or threatened, sometimes for merely technical violations of state reporting requirements.

In Vermont, Dean Corren, a candidate for lieutenant governor, was threatened with a $72,000 penalty "because of an email inviting citizens to a rally." Nick Rummell, *Vermont Campaign-Finance Limits Survive Appeal*, Courthouse News Service (July 31, 2018).[3] Attorney General William Sorrell argued that the email, which was sent by the state Democratic Party, constituted an impermissible contribution to a publicly financed campaign. *Id.*

Although the candidate offered to pay the value of the email—$255—the Attorney General held fast, demanding that Mr. Corren forfeit his $52,000 in public financing, itself a substantial penalty, and pay an additional $20,000 fine on the $255 expenditure. *Id.* It took a lawsuit against Mr. Sorrell's office for the Attorney General to back down. That case was ultimately settled for $255. *Id.*

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[3] *Available at:* https://www.courthousenews.com/vermont-campaign-finance-limits-survive-appeal/

A case in the State of Washington went further still. In November 2016, an $18 million penalty ($6 million plus treble damages) was levied against the Grocery Manufacturers Association for inadvertently failing to register as a political committee. *State of Wash. v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. Nov. 2, 2016).[4]

The trial court based its fine on its previous order that there was no need to show "'subjective intent to violate the law. In other words, [treble damages were] not limited to only those instances where the person subjectively knew their actions were illegal and acted anyway.'" Slip Op. at 33, *State of Wash. v. Grocery Mfrs. Ass'n*, Nos. 49768-9-II, 50188-1-II (Wash. Ct. App. Sept. 5, 2018) (citation omitted).[5]

It was not until nearly two years later, on appeal, that the Grocery Manufacturer's Association learned that it "only" owed $6 million because "a party must have knowledge that it was violating the law to be subject to treble damages." Slip Op. at 34, *Grocery Mfrs. Ass'n*, Nos. 49768-9-II, 50188-1-II; *compare Citizens United*, 558 U.S. at 334 ("Today, Citizens United finally learns, two years after the fact, whether it could have spoken...."). But the appellate court ruled purely as a matter of statutory interpretation. *Compare United States v. Bajakajian*, 524 U.S. 321, 334 (1998), *superseded by statute on*

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[4] *Available at* :
https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/GMA%20Ruling%20110216.pdf.

[5] *Available at* :
http://www.courts.wa.gov/opinions/pdf/D2%2049768-9-II%20Published%20Opinion.pdf

other grounds[6] ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality...."). And the State has vowed to appeal. Don Jenkins, *Washington AG to press for $18 million fine against foodmakers*, Capital Press (Sept. 6, 2018).[7]

These cases involve candidates and organizations that secured counsel and fought back. That luxury is often unavailable to smaller organizations that are more likely to be intimidated by the prospect of a grossly disproportionate fine. Such groups are common at the state and local level, and it is precisely those organizations that require the Eighth Amendment's protection. *See Sampson v. Buescher*, 625 F.3d 1247, 1251-1253 (10th Cir. 2010) (complaint filed against organization that made "nonmonetary contributions...totaling $782.02").

In the State of Montana, a small group failing to follow the law can face statutory treble damages in civil penalties "in a civil action brought by the commissioner [of political practices]." Mont. Code Ann. 13-37-128(1). Colorado provides a more extreme example: its *constitution* imposes "a civil penalty of *at least double and up to five times* the amount contributed, received, or spent" for certain campaign finance violations. Colo. Const. art. XXVIII, § 10(1) (emphasis supplied).[8] Of the other States that have

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[6] As stated in *United States v. Toro-Barboza*, 673 F.3d 1136, 1154 (9th Cir. 2012).

[7] *Available at*: http://www.capitalpress.com/Washington/20180906/washington-ag-to-press-for-18-million-fine-against-foodmakers.

[8] The Colorado Constitution also requires penalties of $50 per day for failure to file a disclosure report, and those fines are not

expressly disclaimed incorporation of the Excessive Fines Clause, Michigan imposes treble damages for some independent expenditure committee violations, Mich. Comp. Laws § 169.224b(5)(b), while Indiana imposes double or triple damages in certain cases. Ind. Code § 3-9-4-16(e) – (g).

These harms are compounded by the complicated nature of political regulation. Notwithstanding this Court's pronouncement that speakers need not "retain a campaign finance attorney" before acting, if states levy exorbitant fines for technical violations, it will be very unwise to take this Court's advice on the question.[9] *Citizens United*, 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney...before discussing the most salient political issues of our day.").

Campaign finance law is famously complicated, as demonstrated by both social studies and the real-

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subject to an aggregate cap. *See* Colo. Const. art. XXVIII, § 10(2). A $1,000 group unaware of this fact would, within 20 days, forfeit its entire bank balance to the state.

[9] Especially where the state has created an independent agency specifically to identify and punish errors. In such cases, the temptation toward aggressive enforcement will be acute. *See* Mike Dennison, *'Partisan hack' or 'thorough professional?' Crusading political commissioner has been called both*, Helena Independent Record (Jan. 26, 2014), https://helenair.com/news/local/partisan-hack-or-thorough-professional-crusading-political-commissioner-has-been/article_82f1ad02-8657-11e3-90df-0019bb2963f4.html ("[The Commissioner] targeted specific candidates, and he just took over the investigations, directed everything I did, from day one... Every commissioner I worked for before... stayed out of investigations, and now he's directing them.'") (second ellipsis in original).

world experiences of those seeking to engage in the political arena. Tr. of Oral Arg. 17, *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (Oct. 8, 2013) (Scalia, J.) ("I agree that – that this campaign finance law is so intricate that I can't figure it out.").

In one study of 255 people "asked to complete the actual disclosure forms for California, Colorado or Missouri based on a simple scenario typical of grassroots political activity...[n]o one completed the forms correctly." Jeffrey Milyo, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate* 3-4 (Institute for Justice, Oct. 2007). [10] Even individuals with advanced degrees can struggle. *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1178, 1179 n.2 (D. Colo. 2014) ("Her initial research suggested [that her small nonprofit] was 'in the clear,' but when a friend familiar with Colorado's campaign finance regime second-guessed that conclusion, she investigated further. Reviewing the relevant statutes and constitutional provisions, Dr. Hsieh found it 'impossible' to figure out what she was supposed to do. Concerned...she decided to register."). [11]

Allowing the States to threaten $20,000 fines for a $255 mistake will necessarily chill political debate, betraying our Constitution's "commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

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[10] *Available at*: http://ij.org/wp-content/uploads/2015/03/CampaignFinanceRedTape.pdf

[11] *Aff'd sub nom. Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 173 (2016).

III. Incorporation of the Excessive Fines Clause will protect this Court's complicated campaign finance jurisprudence from misapplication.

Furthermore, incorporation will provide a means of invalidating outrageous fines without entering the thicket of this Court's campaign finance jurisprudence.

Limits on political expenditures are reviewed under strict scrutiny. *Citizens United*, 558 U.S. at 340. But laws that merely limit the right to make a contribution are considered under a unique standard of review known as "closely drawn" scrutiny. *Randall v. Sorrell*, 548 U.S. 230, 247 (2006). Further, a disclosure reporting requirement, or an on-communication proclamation [12] of sponsorship, is reviewed under something called "exacting scrutiny," *Citizens United*, 558 U.S. at 366-367, which may—or may not—be equivalent to strict scrutiny. *See Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1249 (11th Cir. 2013) ("Though *possibly* less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp.") (quoting *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (*en banc*) (emphasis supplied)).

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[12] Although such compelled speech is often referred as a "disclaimer," Judge Easterbrook has properly noted that such requirements could better be described as "proclaimers." *Majors v. Abell*, 361 F.3d 349, 358 (7th Cir. 2004) (Easterbrook, J., *dubitante*).

So: is a $10,000 fine appropriate if it were levied for an improper contribution of $1,000, but not for an improperly reported expenditure of $1,000?[13]

Another issue: under this Court's First Amendment jurisprudence, corporations, unlike individuals, may be banned from making contributions. *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 149 (2003). Nevertheless, 27 States permit corporations to make such contributions, although they must be properly reported. Institute for Free Speech, *Free Speech Index: Grading the 50 States on Political Giving Freedom* 28 (2018)[14]; *see, e.g.*, Va. Code Ann. § 24.2-949.5(B)(2) (contributor reporting regime for donations to political committees in Virginia, which permits unlimited corporate contributions). What is the relevance of this reduced constitutional protection? If a state or local government imposed a massive fine for improperly reporting a contribution, would it matter whether the funds were given by a small nonprofit corporation rather than an individual?

Such questions are inescapable and cannot be answered by simply applying precedent. These scenarios are ripe for the *mis*application of this Court's First Amendment decisions, precisely because the underlying question is not, properly, about the validity of the statute (a First Amendment inquiry)

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[13] For that matter, is a reporting error less grave in a legislative election than a judicial one? *Williams-Yulee v. The Fla. Bar*, 576 U.S. __; 135 S. Ct. 1656 (2015).

[14] *Available at*: https://www.ifs.org/wp-content/uploads/2018/03/IFS-Free-Speech-Index-Grading-the-50-States-on-Political-Giving-Freedom.pdf

but rather of the penalty (an Eighth Amendment question).

This case cannot, obviously, resolve the tensions inherent in this Court's campaign finance jurisprudence. *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 501-02 (D.C. Cir. 2016) (noting that the "fragile arrangement" upon which this "Court's campaign finance jurisprudence subsists...cannot hold") (internal quotation marks omitted). Nevertheless, a victory for Petitioners "has the benefit of both being a correct application" of the Fourteenth Amendment and a mechanism for the protection of the First. *Van Hollen*, 811 F.3d at 501.

CONCLUSION

For the foregoing reasons, the decision of the Indiana Supreme Court should be reversed.

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No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS, *et al.*,
Petitioners,
v.
STATE OF INDIANA,
Respondent.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs to advance its public interest mission and has appeared as *amicus curiae* in this Court on several occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs to advance its purpose and has appeared as *amicus curiae* in this Court on several occasions.

The decision by the Indiana Supreme Court raises important issues of constitutional law that should be addressed by this Court. *Amici* are concerned that the Indiana Supreme Court's ruling, if allowed to stand, will allow state and local government abuses of forfeiture laws to continue. *Amici* believe that freedom from unlawful conversion of property is an inherent individual liberty right which the Constitution must secure for all citizens.

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[1] Pursuant to Supreme Court Rules 37.3 and 37.6, *amici curiae* state that: all parties have consented to the filing of this brief via letters of blanket consent filed with the Clerk, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

For these and other reasons, *amici* urge the Court to reverse the decision of the Indiana Supreme Court.

SUMMARY OF THE ARGUMENT

The Eighth Amendment "excessive fines" clause must serve as a check against state forfeiture laws. Many state and local governments abuse their powers to seize citizens' property on the barest of pretense to raise revenue without having to raise taxes. When the amount the government can take is limited only by the size of a citizen's bank account, the Courts must apply special scrutiny to prevent corrupt practices. The Eighth Amendment was designed to limit these kinds of easily-abused punitive laws, and it applies to the states via the Privileges or Immunities clause of the Fourteenth Amendment.

ARGUMENT

The Eighth Amendment Must Check the Natural Temptations of Governments to Abuse Forfeiture Powers and Must Protect the Privilege of All Americans to Be Free From Unjust Government Theft of Private Property

Forfeiture laws for the seizure of private citizens' property are easily-abused tools of governments. Unsurprisingly, the ease with which these laws can be abused has led to many instances of actual abuse. "This system—where police can seize property with limited judicial oversight and retain it for their own

use—has led to egregious and well-chronicled abuses." *Leonard v. Texas*, 138 S. Ct. 1448 (2017) (cert. denied) (Statement of Justice Thomas). Indeed, vesting such powers in government authorities without ensuring proper checks against misuse are in place virtually guarantees abuse. *See e.g. Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 823 (6th Cir. 2017) ("In this case the defendant Van Buren County took property worth $206,000 to satisfy a $16,750 debt, and then refused to refund any of the difference. In some legal precincts that sort of behavior is called theft.") (Kethledge, dissenting).

Occasionally, the abuse takes the form of governments using forfeiture laws to fill their coffers instead of raising taxes. *See* Thomas J. Fitton, President, Judicial Watch, *Testimony Before New York State Assembly* (December 9, 2014) ("[T]he New York Police Department [has] broad authority to seize currency and property whenever an arrest is made. Because seized assets are used to fund the NYPD's pension fund and for other law enforcement purposes, the system creates a perverse incentive.").[2] The U.S. Department of Justice acknowledged these risks of abuse *even while rescinding* its modest prior reform, which slightly limited the federal government's ability to aid and abet state and local civil asset forfeitures. *See* U.S. Department of Justice, *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement*, Press Release (July 19,

[2] Available at http://www.judicialwatch.org/wp-content/uploads/2014/12/CivilForfeitureNYTestimony1209014-tf.pdf.

2017) ("[T]he federal government will not adopt seized property unless the state or local agency involved provides information demonstrating that the seizure was justified by probable cause.... In addition to these safeguards... Department attorneys [should] proceed with an abundance of caution when handling all forfeitures involving vehicles and especially residences.").[3]

And where both the due process clause (*Leonard v. Texas*) and takings clause (*Wayside Church*) have not always been held as constitutional checks on governments' punitive seizure of property, the Eighth Amendment was designed for it. U.S. const., amend. VIII.

The excessive fines clause of the Eighth Amendment traces its roots to the English Bill of Rights, and before that the Magna Carta. *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 270-271 (1989) ("The barons who forced John to agree to Magna Carta sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown."). The way to determine if a fine was excessive was to look at the gravity of the illegal behavior, the size of the fine relative to the behavior, whether the fine's purpose or effect was to bankrupt a violator, and whether the exact amount of the fine had been set by a jury or demo-

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[3] Available at https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state.

cratically accountable body. *Browning-Ferris Indus.* at 271.

Recently, this Court explained the factors to determine if a fine is excessive include whether a legislative body set the amount of the fine, and whether the fine is grossly disproportionate to the gravity of the offense. *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). Then as now, when a government appears to be relying on fines to raise revenues, the judiciary must scrutinize the fines to ensure they are intended and effective at reducing crime and not just at filling state coffers:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

Harmelin v. Michigan, 501 U.S. 957, at 980, fn 9 (1991).

The idea that excessive forfeitures will deter crime by financially devastating offenders always requires scrutiny. First, such penalties necessarily

allow a large margin of error for punishing innocent people – especially when forfeitures are applied without a criminal conviction. Furthermore, whether the forfeiture is civil, criminal, or administrative, when alleged or actual violations are routinely met with harsh penalties, the result is ever-increasing government punishments are needed to deter crime at all. Once citizens become inured to governments confiscating their wealth over minor or merely alleged transgressions, ordinary and reasonable penalties lose their deterrence value. "Severity in penalties suits despotic government, whose principle is terror..." Montesquieu, THE SPIRIT OF THE LAWS, Book 6, ch. 9, at 82 (Cambridge Univ. Press 1989) (1748).

The inherent right of U.S. citizens to be free from excessive financial penalties is not one held exclusively against the federal government. It is therefore proper that the Eighth Amendment be applied to state and local governments, because the ability to live free of unjust government financial penalties both "play[s] an important role in furthering a vital national economy" as well as "vindicat[es] individual and societal rights." *Lee v. Minner*, 458 F.3d 194, 199-200 (3d Cir. 2006) (citations and punctuation omitted); *see also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280-81 (1985). The issue is whether states may impose "excessive" fines at all, not whether they may only levy "excessive" fines when accompanied by adequate procedural safeguards to ensure the excessive fines are being applied fairly. As Justice Thomas explained:

> [T]he Court concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is 'fundamental' to the American 'scheme of ordered liberty,' and 'deeply rooted in this Nation's history and tradition.' I agree with that description of the right. But I cannot agree that it is enforceable against the States through a Clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.

McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, concurring) (citations omitted, cleaned up); U.S. const. amend. XIV, § 1.

CONCLUSION

For all the foregoing reasons, *amici* respectfully request that the Court reverse the Indiana Supreme Court decision.

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BRIEF OF AMICI CURIAE JUVENILE LAW CENTER AND FORTY OTHER ORGANIZATIONS IN SUPPORT OF PETITIONERS

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UNITED STATES SENTENCING COMM'N, YOUTHFUL OFFENDERS IN THE FEDERAL SYSTEM 15 (2017), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf 7

INTEREST OF AMICI[1]

The organizations submitting this brief work on behalf of youth who have been involved with the juvenile and criminal justice systems. *Amici* support young people through litigation, direct representation, policy advocacy, education, and training. *Amici* also work to stem the punitive effects of juvenile justice system involvement and to promote rehabilitation and reintegration of young people who have experience with the justice system. To inform their advocacy and their position in this brief, *Amici* have considered research on adolescent development and legal principles that recognize the distinct attributes of youth, as well as their own experiences working directly with young people.

Amici share a deep concern that the economic consequences of juvenile justice system involvement will follow them for the rest of their lives, setting them up for future failure. For this reason, *Amici* join together to educate this Court about the punitive effects of juvenile justice fines, to clarify why imposing financial obligation on court-involved youth is uniquely harmful to young people and their families, and to explain how its decision in this matter will impact justice-involved youth across the country.

See Appendix A for a list and brief description of all *Amici*.

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[1] Pursuant to Rule 37.2 counsel of record received timely notice of the intent to file this brief. Written consent of all parties has been provided. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case will have broad and serious implications not only for adults in criminal court, but also for thousands of young people across the country facing fines and fees in the juvenile justice system.

The purpose of the Eighth Amendment is to guard against government abuses in the imposition of punishment. *Austin v. United States*, 509 U.S. 602, 609-10 (1993).

A state court's power to impose economic sanctions squarely implicates the concern with potential for governmental abuse of its power to "extract payments" embodied by the Eighth Amendment. *Id.* at 609-10. As Petitioner argues, the constitutional prohibition on excessive fines "is fundamental to our scheme of ordered liberty" such that it should be applied to the states. (Pet. Cert. 22 (citing *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010))).

Amici write separately to underscore that children across the country will also be at risk of serious harm and disproportionate penalties if the Excessive Fines Clause is not incorporated against the states. Juvenile justice fines are widespread, imposed against children and their families in all 50 states. They include traditional monetary sanctions or fines, imposed solely as punishment for a young person's conduct, as well as penalties that ostensibly serve a remedial purpose, at least in part. Regardless of their form, juvenile justice fines can have devastating consequences for children and their families, including deprivation of liberty, interference with family property, and infringement on family unity. The impact is felt by children, as well as their parents,

siblings, and family members—who lack any culpability for the underlying offense.

The harsh effects of juvenile justice fines are at odds with this Court's recognition of young people's diminished culpability. Despite extensive jurisprudence reflecting this Court's acknowledgment that youth's immaturity may lead to impulsive behavior that is inherently less blameworthy than conduct attributed to an adult, *see, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005), young people face these fines at all stages of the juvenile justice system.

Yet without a constitutional prohibition on disproportionately harsh punishments, states have little motive to reel in juvenile justice fines. The state courts that in some cases may have discretion to temper the harshness of monetary sanctions benefit directly from juvenile justice fines. This scenario is precisely what the federal Excessive Fines Clause aims to prevent.

Against this backdrop, *Amici* respectfully urge this Court to incorporate the Excessive Fines Clause of the Eighth Amendment against the states to secure the fundamental right to be free of excessive punishment.

ARGUMENT

The incorporation of the Excessive Fines Clause against the states is desperately needed to protect young people and their families from the harsh consequences of juvenile justice fines and fees. Every state juvenile justice system imposes financial sanctions that can cause economic hardship, further justice system involvement, family stress, and

increased recidivism. Juvenile justice system fines are particularly harmful not only because of these negative consequences, but also because they target a population that is uniquely unable to pay because of their status as minors.

I. YOUTH ARE EXPOSED TO EXCESSIVE FINES IN STATE JUVENILE COURTS ACROSS THE COUNTRY

A. Every State Juvenile Justice System Authorizes Fines

Every state authorizes juvenile courts to impose financial obligations on youth—and sometimes their family members—when a child is accused or adjudicated of delinquent behavior. *See generally* JESSICA FEIERMAN ET AL., DEBTORS' PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM i, App. A (2016) [hereinafter DEBTORS' PRISON FOR KIDS]. This includes explicit provisions authorizing fines in forty-two states, as well as a host of other monetary penalties that also qualify as fines for Eighth Amendment purposes.[2]

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[2] An argument that all juvenile court-imposed financial obligations merit Eighth Amendment scrutiny is beyond the scope of this brief, but it is worth noting that many juvenile monetary penalties are fines under the Eighth Amendment because they are punitive in part. *See Austin v. United States*, 509 U.S. 602, 609-10 (1993). The punitive intent of many juvenile justice fines is clear on their face. *See, e.g.*, KY. REV. STAT. ANN. § 610.180 (West 1988). In other instances, their history demonstrates the legislative intent to punish. *See infra* § II.A. The consequences of failing to pay any juvenile

Although youth in the juvenile justice system are typically too young to work or legally restricted from establishing any real earning capacity,[3] forty-two states explicitly authorize assessment of fines against youth found delinquent in the juvenile justice system. (*See* App. B: Monetary Penalties Labeled As Fines 21A-25A.) Indeed, some states authorize fines no different from those imposed on adults in the criminal justice system. *See, e.g.*, CAL. WELF. & INST. CODE § 730.5 (West 1988); DEL. CODE ANN. tit. 10, § 1009A (West 2006); GA. CODE ANN. §§ 15-11-601(a)(8) (West 2017), 15-11-630(g)(4) (West 2015); MICH. COMP. LAWS ANN. § 712A.18(1)(j) (West 2018); N.J. STAT. ANN. § 2A:4A-43(b)(8) (West 2012); N.M. STAT. ANN. § 32A-2-19(B) (West 2009); N.C. GEN. STAT. ANN. § 7B-2506(5) (West 2017); OKLA. STAT. ANN. tit. 10A, § 2-2-503(A)(7)(d) (West 2016); OR. REV. STAT. ANN. § 419C.459 (West 2012); WIS. STAT. ANN. § 938.34(8) (West 2018); WYO. STAT. ANN. § 14-6-247(a)(vi) (West 2013). Other states mandate that juvenile courts assess fines regardless of the young person's financial circumstances. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-341(S) (2018); FLA. STAT. ANN. § 806.13(6)(c) (West 2002); IDAHO CODE ANN. § 20-549 (West 2015). And fines can be substantial; some state statutes authorize fines up to, or exceeding, a thousand dollars for a single offense. ARIZ. REV. STAT. ANN. § 8-341(S); FLA. STAT. ANN. § 806.13(6)(a)(3) (West 2002); KAN. STAT. ANN. § 38-2361(a)(8), (e) (West 2017); OHIO REV. CODE

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court-imposed financial obligation are almost always the same, if not harsher, than those that follow from failing to pay a formal fine. *See infra* § II.

[3] *See infra* § II.A. for an analysis of the legal and practical obstacles to employment for youth.

ANN. § 2152.20(A)(1)(i) (West 2017); S.D. CODIFIED LAWS 26-8C-7(2) (2016).

States also impose a host of other monetary sanctions on youth. For example, justice-involved children and their families face probation costs in nineteen states. (*See* App. C: Probation Fees 26A-28A.) Probation costs frequently accumulate over time: many states assess them on a monthly basis, *e.g.*, GA. CODE ANN. § 15-11-37(b)(1) (West 2014), still others charge them *each day* a child is on probation, *e.g.*, FLA. STAT. ANN. §§ 985.514(2) (West 2017), 985.039 (West 2014). While some states assess fees against the child, *e.g.*, COLO. REV. STAT. ANN. §§ 19-2-925(2)(k) (West 2018), 24-4.2-104 (West 2014), others burden parents with the costs of supervision, *e.g.*, CONN. GEN. STAT. ANN. § 46b-141c (West 2018). Indeed, some states justify probation fees against parents on the notion that parents are blameworthy for their child's offense. *See, e.g.*, KY. REV. STAT. ANN. § 610.180 (assessing fee only upon finding that parent's "failure or neglect is the proximate cause of the act or acts of the child upon which the adjudication is based").

Forty-one states have laws that authorize the assessment of costs for court-ordered juvenile justice placements. (*See* App. D: Incarceration Fees 29A-33A.) This financial obligation, most often imposed on the parents of system-involved youth, creates a serious economic burden. States and counties may charge parents hundreds of dollars *per day* while their child is incarcerated. Bills can quickly climb into the tens of thousands of dollars, and are often created for the punitive purpose of ensuring that parents have "skin in the game." *See* Eli Hager, *Your Kid Goes to Jail, You Get the Bill*, THE MARSHALL PROJECT, (Mar.

2, 2017) [hereinafter *Your Kid Goes to Jail*] (quoting James Bueche, head of Louisiana's Office of Juvenile Justice), https://www.themarshallproject.org/2017/03/02/your-kid-goes-to-jail-you-get-the-bill?ref=collectionsa.

Youth in the juvenile justice system in many states are also required to pay individual assessment or evaluation costs, diversion fees, restitution, and other financial obligations that may be subject to scrutiny under the Excessive Fines Clause. *See generally* DEBTORS' PRISON FOR KIDS.

B. Young People Encounter Excessive Fines Almost Exclusively In State Court Proceedings

From a practical perspective, the constitutional limitation on excessive fines is meaningless if it does not apply against the States: when young people face monetary sanctions, it is virtually always at the hands of a state actor.

The Federal Juvenile Delinquency Act permits federal delinquency proceedings only where state courts cannot or will not accept jurisdiction. 18 U.S.C.A. §§ 5001 (1988), 5032 (1996). Thus, in 2015, state juvenile courts processed 884,900 delinquency cases. THE NAT'L CTR. FOR JUV. JUSTICE & THE OFFICE OF JUV. JUSTICE AND DELINQ. PREVENTION, JUVENILE COURT STATISTICS 2015 6 (2018), *available at* https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2015.pdf. By comparison, federal courts sentenced only 52 individuals under age 18 during the previous five years. UNITED STATES SENTENCING COMM'N, YOUTHFUL OFFENDERS IN THE FEDERAL SYSTEM 15

(2017), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf.

If the Constitution does not limit the states' power to impose unduly harsh monetary penalties through the incorporation doctrine, young people across the country will be at risk of excessive fines. Of the 49 state constitutional provisions limiting excessive fines, 35 afford different protections than those in the Eighth Amendment. *See* Richard S. Frase, *Limiting Excessive Prison Sentences under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 64-65 (2008). Each of the states of course is free to interpret these provisions to be more protective than the federal Constitution; but absent incorporation, they can also afford fewer protections. State courts have repeatedly demonstrated their reluctance to find broader protections against excessive penalties under state constitutions. *Id.* at 66.

As explained below, this Court cannot cede its obligation to curtail excessive monetary sanctions to the same actors that stand to benefit from the imposition of financial obligations.

C. States Inappropriately Rely On Fines To Generate Revenue

This Court has long recognized that "[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991). When state and local courts assess costs and fees in order to raise revenue, the courts' actions cast doubt on their

impartiality. "There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence" precisely because "fines are a source of revenue." *Id.*

Juvenile justice fines implicate the fears raised in *Harmelin* because they inure to the benefit of the state government. The United States Department of Justice has noted that "[i]n some places, justice systems have been transformed into revenue centers that pay for even a jurisdiction's non-justice-related government operations." U.S. DEP'T OF JUSTICE, RESOURCE GUIDE: REFORMING THE ASSESSMENT AND ENFORCEMENT OF FINES AND FEES 2 (2016), *available at* http://ojp.gov/docs/finesfeesresguide.pdf.[4] Juvenile courts are no exception to this disturbing trend and are similarly reluctant to "relinquish the revenue" that they receive from fines and fees imposed on young people. *See* Teresa Wiltz, *Movement Against Juvenile Court Fees Runs Into Resistance*, HUFFINGTON POST, (Jan. 17, 2018) (citing Judge Jay Blitzman, juvenile court judge in Middlesex County, Massachusetts), https://www.huffingtonpost.com/entry/movement-

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[4] While it is clear that juvenile systems, like adult criminal justice systems, seek fines for the purpose of revenue generation it is less clear that they succeed. Rather the high cost of collection may sometimes outweigh the economic gain. *See, e.g.*, BERKELEY LAW POLICY ADVOCACY CLINIC, HIGH PAIN, NO GAIN: HOW JUVENILE ADMINISTRATIVE FEES HARM LOW-INCOME FAMILIES IN ALAMEDA COUNTY, CALIFORNIA 12 (2016) [hereinafter HIGH PAIN, NO GAIN], *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2738710

against-juvenile-court-fees-runs-into-resistance_us_5a5f6c2fe4b0c40b3e5975fd.

II. YOUTH ARE UNIQUELY VULNERABLE TO HARM FROM FINES

Juvenile justice fines not only implicate youth's fundamental right to property, but may interfere with their liberty interests, their interests in family unity, and their rights to equal protection. For young people with no realistic way to earn money, fines create financial obligations that are impossible to meet. In juvenile justice systems designed to be rehabilitative, fines increase recidivism and destabilize families. And far too often, fines lead to further justice system involvement, including incarceration in secure prison- and jail-like conditions that have consistently been shown to be harmful to youth. As the Ninth Circuit Court of Appeals has explained, financial obligations in the juvenile justice system "compromise the goals of juvenile correction and the best interests of the child, and, ironically, impair the ability of [the parent] to provide . . . future support." *Rivera v. Orange County Probation Dep't* (*In re Rivera*), 832 F.3d 1103, 1111 (Bankr. 9th Cir. 2016) (holding that the cost of juvenile detention was not a domestic support obligation excepted from bankruptcy discharge). Moreover, fines heighten existing economic and racial disparities in the juvenile justice system.

For any individual these harms would be constitutionally relevant; for young people, the harms are more severe and the constitutional obligation is heightened. The touchstone of an excessive fines inquiry is whether the penalty is "grossly disproportional to the gravity of the defendant's

offense." *United States v. Bajakajian*, 524 U.S. 321, 337 (1998). This Court has consistently recognized the reduced culpability of adolescents. *See Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding the death penalty disproportionate when imposed on children); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (sentencing a child who committed a non-homicide offense to life without parole violates the Eighth Amendment); *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (sentencing a child to mandatory life imprisonment without parole violates the Eighth Amendment). This Court has also recognized that punishments typically applied to adults may be more severe when inflicted on children. *Graham*, 560 U.S. at 70-71; *Miller*, 567 U.S. at 475. For example, sentencing a child to life without parole is an "'especially harsh punishment for a juvenile,' because he will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.'" *Miller*, 567 U.S. at 475 (quoting *Graham*, 560 U.S. at 70). Adult penalties are "the same . . . in name only" when applied to young people and require a "distinctive set of legal rules" to determine how severely they punish youth. *Id.* For the reasons set forth below, fines have a uniquely damaging effect when imposed on adolescents.

A. Children Cannot Pay Fines

Fines are distinctly problematic when imposed on young people too young to have any real earning capacity. Some youth in the juvenile justice system are not old enough to work at all, or at least cannot

work full time under federal law.[5] Most are also of compulsory school age.[6] Those who are old enough to work under state or federal laws are often shut out of the labor market; indeed jobs that were once typically held by adolescents are now increasingly filled by adults.[7] The challenges are particularly acute for

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[5] The Fair Labor Standards Act sets 14 as the minimum age for most non-agricultural work. 29 C.F.R. § 570.2 (2012); *see also* U.S. Dept. Labor, Fact Sheet # 43: Child Labor Provisions of the Fair Labor Standards Act (FLSA) for Nonagricultural Occupations (2016), https://www.dol.gov/whd/regs/compliance/whdfs43.pdf.

[6] *See National Center for Education Statistics; Table 5.1: Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, https://nces.ed.gov/programs/statereform/tab5_1.asp (last visited Sept. 7, 2018).

[7] One recent study found that the number of jobs held by teenagers between ages 14 and 18 shrank by 33% between 2001 and 2014. Career Builder, The Changing Face of U.S. Jobs: Composition of Occupations by Gender, Race, and Age from 2001-2004 13 (2015), *available at* http://careerbuilder-communications.com/pdf/changing-face-of-us-jobs.pdf. Another study found that the youth employment rate in 2011 was 26%, the lowest since World War II. JP MORGAN CHASE & CO., BUILDING SKILLS THROUGH SUMMER JOBS: LESSONS FROM THE FIELD 4 (2015), https://www.jpmorganchase.com/corporate/Corporate-Responsibility/document/54887-jpmc-summeryouth-aw2.pdf. Teens seeking jobs are now in competition with college graduates, workers over 55, and others competing for the same entry-level roles. Andrew Soergel, *Why Teens are Getting Shut out of the Workforce: They're Seeing Increased Competition, But That's Not the Only Reason*, U.S. NEWS & WORLD REP. (Mar. 26, 2015), http://www.usnews.com/news/blogs/data-mine/2015/03/26/studies-suggest-teens-getting-shut-out-of-workforce.

youth living in poverty, who tend to face even greater difficulties than their peers in finding employment.[8]

This was the case for Shyara Hill, who was 16 years old and in foster care when she got into a fight at school, defending her brother from a bully. After three years of probation, the court informed her that she could close her case only if she paid $420 in fees. Having just finished a week of employment at her first job, she didn't have the money. As a result, she remained on probation for yet another year. Semantha Melamed, *Philly Locks Up Kids for Truancy, Fighting – Then Goes After Parents for Child Support*, PHILADELPHIA INQUIRER (October 17, 2016), http://www.philly.com/philly/news/Phillys-working-poor-child-support-debtors-prison.html?arc404=true.

Even for the few youth who do obtain employment, pushing youth to work too much and too soon may lead to long-term negative consequences including worse academic performance and increased school drop-out rates,[9] directly undermining the rehabilitative goals of the juvenile justice system.

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[8] According to a report from the Center for Labor Market Studies at Northeastern University, only 21% of teenagers from low-income families worked at all, while 38% of wealthier teens had jobs. ANDREW SUM ET AL., THE DISMAL STATE OF THE NATION'S TEEN SUMMER JOB MARKET, 2008-2012, AND THE EMPLOYMENT OUTLOOK FOR THE SUMMER OF 2013 4 (2013), https://repository.library.northeastern.edu/downloads/neu:m0406v58n?datastream_id=content.

[9] According to one study, youth who work more than 20 hours a week "may have lower grade point averages and are more likely to drop out of school than those who work fewer hours." CHILD TRENDS DATA BANK, YOUTH EMPLOYMENT: INDICATORS ON CHILDREN AND YOUTH 2 (2015), *available at*

B. Juvenile Justice Fines Lead To Increased System Involvement And Incarceration

Too often, inability to pay a fine pushes children deeper into the juvenile justice system. Youth may be forced to remain on probation while bills are outstanding, *see, e.g.*, COLO. REV. STAT. ANN. §§ 19-2-925(2)(k), 24-4.2-104, even when their parents are ultimately responsible for the payments. This was the case for Dequan Jackson, who, as a 13-year-old student, was adjudicated delinquent for horseplay at school. Erick Eckholm, *Court Costs Entrap Nonwhite, Poor Juvenile Offenders*, THE NEW YORK TIMES (Aug. 31, 2016), https://www.nytimes.com/2016/09/01/us/court-costs-entrap-nonwhite-poor-juvenile-offenders.html. When his mother could not pay $200 in court and public defender fees, Dequan remained on probation for an additional 14 months, accruing still more fees that he and his mother could not afford. *Id.*[10] Despite complying with all other terms of probation, including attending counseling, working at a food bank, and

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http://www.childtrends.org/wp-content/uploads/2012/05/120_Youth_Employment.pdf. The study notes that "Overall, the negative effects of employment appear to be linked, not to whether students work, but how often and how long." *Id.*

[10] Increased supervision in itself interferes with a youth's liberty by mandating compliance with conditions like curfews, probation check-ins, monitoring, and mandatory services. Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POLICY 51 (2013). The increased oversight it carries in turn leads to increased risks of incarceration in the future. *Id.* at 55-57.

complying with a strict curfew, his financial status alone kept him under justice system supervision. *Id.* "You feel like you're drowning and you're trying to get some air, but people are just pouring more water into the pool," he later said. *Id.*

Young people without the ability to pay may also be precluded from participation in programs that allow them to avoid further justice system involvement. *See, e.g.*, OKLA. STAT. ANN. tit. 10A, § 2-2-104(E)-(F) (West 2013). In at least 14 states, attorneys or other professionals working with youth confirmed that children are denied participation in diversion programs because of inability to pay the fees—and consequently that they faced formal petitions in the juvenile justice system. DEBTORS' PRISON FOR KIDS, *supra*, at 12. In some of those states, the inability to pay ultimately led to placement in juvenile justice facilities. *Id.*

Juvenile justice fines also lead to youth incarceration. In one national survey, juvenile justice practitioners in 26 states reported that juvenile courts in their jurisdictions detained young people when they failed to pay juvenile justice fines—either as a direct consequence of nonpayment, as a form of civil or criminal contempt, or because nonpayment violated probation conditions. *See* DEBTORS' PRISON FOR KIDS, *supra*, at 23-24; *see also, e.g.*, ALA. CODE § 12-15-117(d) (2012); ME. REV. STAT. Ann. tit. 15, § 3314(7) (2018); OKLA. STAT. ANN. tit. 10A, § 2-7-504(D) (West 2017); WASH. REV. CODE ANN.§ 13.40.200(2)-(3) (West 2004).

A 13-year-old in Arkansas, for example, reported spending three months in a locked facility because he could not pay a $500 truancy fine. DEBTORS' PRISON FOR KIDS, *supra*, at 18. He appeared in court without a lawyer or parent. *Id.* When given

the choice between spending time in a correctional facility and payment, he saw no alternative but to do the time:

> [M]y mind was set to where I was just like forget it, I might as well just go ahead and do the time because I ain't got no money and I know the [financial] situation my mom is in. I ain't got no money so I might as well just go and sit it out.

Id.

C. Juvenile Justice Fines Lead To Increased Recidivism

Criminology research shows that juvenile justice fines are associated with increased recidivism, even when controlling for relevant demographic and case characteristics. Alex R. Piquero & Wesley G. Jennings, *Research Note: Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 1, 1 (2016) [hereinafter *Justice System-Imposed Financial Penalties*], *available at* https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison-criminology-study-2016.pdf. The higher the fees, the greater the impact on recidivism. *Id.* at 10.

These findings are unsurprising given the added stress that juvenile justice fines create. In *Making Families Pay*, a report that highlighted the problem of fines and fees in California, the authors quoted probation officers in more than one California county recognizing that the strain of fees may hamper

efforts to support positive outcomes for youth and families. STEPHANIE CAMPOS-BUI ET AL., MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA 19-22 (2017) [hereinafter MAKING FAMILIES PAY], *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2937534.

D. Juvenile Justice Fines Punish Families

Juvenile justice fines push low-income families deeper into poverty and require families to make devastating decisions, often pitting one child's needs against another's. Seemingly minimal payments may require families to sacrifice basic necessities, such as buying groceries. *See generally*, DEBTORS' PRISON FOR KIDS, *supra*, at 6-7 (discussing responses from national survey; reporting that "scraping together 10 to 15 dollars out of [the] monthly budget to pay on these fees, fines, and costs . . . means the difference to some [families] between eating for a day or two" (second alteration in original). One attorney explained that these financial obligations "can determine if another child in the family goes to college or not. Gets school clothes or not. Get[s] to do anything else other children get to do because money is being spent on the juvenile system." *Id.*[11]

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[11] These fines also often inflict punishment on the wrong person: parents and siblings of young people in the juvenile justice system are not culpable, yet they may bear the burden of juvenile justice fines equally, given the shared nature of family economic resources. The right of innocent people to be free from punishment, contravened by juvenile justice fines, is well-established. *See, e.g.*, *Thompson v. City of Louisville*,

And more substantial fines cause an even greater burden. One parent was forced to sell her house and file for bankruptcy when faced with a $9,500 bill for her son's incarceration. *Your Kid Goes to Jail, supra.* A foster mother facing $16,000 in costs had her wages and tax returns garnished and ultimately lost her home. "I'm really in despair," she explained, "There's a dark cloud over my life. I have absolutely nothing." Erin B. Logan, *Courts in Most States Charge Juveniles to Exist Inside the Justice System. This Movement Wants to Change That,* WASHINGTON POST (August 10, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/08/10/courts-in-most-states-charge-juveniles-to-exist-inside-the-justice-system-this-movement-wants-to-change-that/?noredirect=on&utm_term=.8e135345c1e2.

Juvenile justice fines can tear families apart in even more tangible ways: when the court charged one grandmother detention fees upon her grandson's detention, she felt pressured to relinquish custody rather than be stuck with fees she could not pay. MAKING FAMILIES PAY, *supra*, at 11. Another grandmother, faced with insurmountable juvenile justice fees, spoke to a county employee who told her that handing over custody was the only way to avoid paying. DEBTORS' PRISON FOR KIDS, *supra*, at 7. Each state's juvenile justice system has a purpose of rehabilitation, competency development, or family support. *See, e.g.*, ALA. CODE § 12-15-101(b) (2008); NEV. REV. STAT. ANN. § 62A.360(2) (West 2004); 42 PA. STAT. AND CONS. STAT. ANN. § 6301(b) (West 2012);

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362 U.S. 199, 206 (1960) ("[I]t [is] a violation of due process to . . . punish a man without evidence of his guilt.").

TEX. FAM. CODE ANN. § 51.01(3) (West 1996). The family stress created by fines directly undermines these goals—heightening the disproportionality of the punishment to the offense.

These fines also punish poor youth and families more severely than their wealthier counterparts, contravening this Court's holdings that a person's wealth should not dictate their treatment in the justice system. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Tate v. Short*, 401 U.S. 395, 397-98 (1971); *Bearden v. Georgia*, 461 U.S. 660, 661-62 (1983).

E. Juvenile Justice Fines Aggravate The Racial And Economic Disparities In The Juvenile Justice System

Youth of color are overrepresented at every stage of the juvenile justice system, even when controlling for alleged conduct. Alex R. Piquero, *Disproportionate Minority Contact*, 18 JUV. JUST. 59, 59-61 (2008). Research shows that juvenile justice fines also reflect and exacerbate this disparity. *Justice System-Imposed Financial Penalties*, *supra*, at 10.

First, because youth of color spend more time on probation and in juvenile facilities than their white counterparts, their families are liable for higher fees. *See, e.g.*, HIGH PAIN, NO GAIN, *supra* note 4, at 9. Second, juvenile fines and fees contribute to recidivism in ways that amplify racial disparities. In a sample of over 1,000 youth, research showed that having unpaid costs after case closing led to higher recidivism, and that youth of color were 68% more likely to have unpaid costs than their white peers.

Justice System-Imposed Financial Penalties, *supra*, at 9-10.

F. The Retributive Effects Of Juvenile Justice Fines Follow Young People Into Adulthood

The punitive repercussions of juvenile justice fines do not vanish with dismissal of a delinquency proceeding. The effects follow youth into adulthood and may burden families well after a young person leaves home.

In a number of jurisdictions, juvenile courts retain jurisdiction over children into adulthood for the sole purpose of collecting payment on juvenile justice fines. *See, e.g.*, ALA. CODE § 12-15-117(c); FLA. STAT. ANN. § 985.0301(5)(d) (West 2015); MO. ANN. STAT. § 211.185(11) (West 1995); OKLA. STAT. ANN. tit. 10A, § 2-7-504(D); WASH. REV. CODE ANN. § 13.40.300(3)(e) (West 2018). In many jurisdictions, juvenile fines become a civil judgment, sometimes subject to payment through wage garnishment, property lien, bank levy, or tax intercept. *See generally* DEBTORS' PRISON FOR KIDS, *supra*, at 23-24; *see also, e.g.*, FLA. STAT. ANN. § 938.29(2)(a)(2) (West 2010); ME. REV. STAT. Ann. tit. 15, § 3314(7); MINN. STAT. ANN. § 260B.331(b) (West 2013); N.J. STAT. ANN. § 2A:158A-17(a) (West 2013); S.D. CODIFIED LAWS § 26-7A-32 (2002).

These policies have grave consequences for a young person's successful transition to adulthood. Young people with civil judgments may be precluded from obtaining or keeping a drivers' license or registering a vehicle. *See* MASS. GEN. LAWS ANN. ch. 211D, § 2A(h) (West 2018); TENN. CODE ANN. § 40-24-

105(b)(1) (West 2018). Civil judgments can interfere with the ability of young people to get loans for higher education or housing. DEBTORS' PRISON FOR KIDS, *supra*, at 23. They may be unable to seek expungement of their records while these debts are outstanding. *See generally* DEBTORS' PRISON FOR KIDS, *supra*, at 23-24; *see also, e.g.*, ARIZ. REV. STAT. ANN. § 8-349(B)(5) (2002); KAN. STAT. ANN. § 38-2312(e)(2) (West 2018). With a juvenile record, limited transportation, obstacles to secure housing and education, and no financial resources, young people face an often insurmountable hurdle to moving past their childhood conduct. *See* RIYA SAHA SHAH & JEAN STROUT, FUTURE INTERRUPTED: THE COLLATERAL DAMAGE CAUSED BY PROLIFERATION OF JUVENILE RECORDS 9-11 (2016), *available at* http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/future-interrupted.pdf. Thus even when fines are imposed for minor adolescent behavior, they may impose subsequent years of punishment on a child.

CONCLUSION

"[T]he Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper*, 543 U.S. at 560. The states' power to impose monetary sanctions on some of their most vulnerable citizens deprives young people and their non-culpable family members of this constitutional protection. Like other sanctions imposed in juvenile justice proceedings, juvenile justice fines demand proportionality review.

For this and all of the foregoing reasons, *Amici* respectfully request that this Court reverse the

Indiana Supreme Court's judgment and expressly recognize that the Eighth Amendment limits the states' power to impose excessive fines.

Respectfully Submitted,

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APPENDIX A: STATEMENTS OF INTEREST OF AMICI CURIAE

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

Arizona Legal Women and Youth Services (ALWAYS) provides free legal services to young people impacted by homelessness, abuse, the foster care system and human trafficking.

The **Barton Child Law and Policy Center** is a clinical program of Emory Law School dedicated to promoting and protecting the legal rights and interests of children involved with the juvenile court, child welfare and juvenile justice systems in Georgia. The Center achieves its reform objectives through research-based policy development, legislative advocacy, and holistic legal representation for individual clients. The Barton Center adopts a multidisciplinary, collaborative approach to achieving justice for youth through which children are viewed in their social and familial contexts and provided with individualized services to protect their legal rights, respond to their human needs, and ameliorate the

social conditions that create risk of system involvement.

The Barton Center was founded in March 2000. Its work is directed by Emory Law faculty and performed by law and other graduate students who advocate for children through participation in the Policy and Legislative Advocacy Clinics, the Juvenile Defender Clinic, and the Appeal for Youth Clinic. Under the supervision of experienced faculty members, students represent children in juvenile delinquency, special education, and school discipline cases and seek post-conviction relief for youthful offenders in criminal matters. Students also engage in legislative and policy advocacy on issues impacting vulnerable children. The Barton Center has represented more than 350 youth and trained nearly 1000 students who now serve in leadership positions in nonprofit organizations, state and local government agencies, and private firms.

Legal services provided by the Barton Center are provided at no cost to our clients. The work of the Barton Center is funded by Emory Law School, private gifts, foundation grants, and contracts with a variety of organizations.

Through participation as amicus curiae, the Barton Center hopes to provide a voice for the child and for those who are similarly situated who will be directly and profoundly affected by the court's decision.

The **Campaign for Youth Justice (CFYJ)** is a national initiative dedicated to ending the prosecution, sentencing, and incarceration of youth under 18 in the adult criminal justice system. We believe and research supports that courts should consider the social, psychological, economic, and

neurological development of adolescents when determining the appropriate jurisdictional venue, treatment, and sentencing of youth. Too often, fines and fees are leveraged against youth and their families end up driving youth deeper into the justice system; or keep them incarcerated in dangerous situations for their inability to pay. Youth, particularly those in the adult system, already face significant penalties for their behavior, leveraging excessive fines and fees adds additional collateral consequences that follows them into adulthood, impeding their rehabilitation. For these reasons, we support ending excessive finds on youth and their families.

The **Center for Children & Youth Justice** is a 501(c)(3) non-profit with a mission to improve—through systems reform—the outcomes of children and youth who enter the juvenile justice, child welfare, and related systems. CCYJ works to ensure that such systems are integrated, unbiased, fueled with innovative ideas, and backed by rules and programs proven to achieve the best outcomes for children, youth, and young adults. One of CCYJ's programs provides free limited legal advice to and/or secures pro bono counsel for youth and young adults on a variety of civil legal issues, often related to the collateral consequences of criminal records. CCYJ has previously sought and received leave to file amicus briefing on issues related to the treatment of youth and young adults.

The **Center for Children's Advocacy (CCA)** is a non-profit organization based at the University of Connecticut Law School and is dedicated to the promotion and protection of the legal rights of poor children. The children represented by CCA are

dependent on a variety of Connecticut state systems, including judicial, health, child welfare, mental health, education and juvenile justice. CCA engages in systemic advocacy focusing on important legal issues that affect a large number of children, helping to improve conditions for abused and neglected children in the state's welfare system as well as in the juvenile justice system. CCA works to ensure that children's voices are heard and that children are afforded legal protections everywhere—community, foster placements, educational institutions, justice system and child welfare.

The **Center for Children's Law and Policy (CCLP)** is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works locally in DC, Maryland and Virginia and also across the country to reduce racial and ethnic disparities in juvenile justice systems, reduce the use of locked detention for youth and advocate safe and humane conditions of confinement for children. CCLP helps counties and states develop collaboratives that engage in data-driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems and reduce reliance on unnecessary incarceration. CCLP staff also work with jurisdictions to identify and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

The **Children and Family Justice Center (CFJC)**, part of Northwestern Pritzker School of Law's Bluhm Legal Clinic, was established in 1992 as a legal service provider for children, youth, and families, as well as a research and policy center. Currently, clinical staff at the CFJC provide advocacy on policy issues affecting children in the legal system, and legal representation for children, including in the areas of delinquency and crime, immigration/asylum, and fair sentencing practices. In its 25-year history, the CFJC has filed numerous briefs as an amicus curiae in this Court and in state supreme courts based on its expertise in the representation of children in the legal system. *See, e.g.*, Amicus Br., *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015) (No. 14-280), 2015 WL 4624620; Amicus Br., *Watson v. Illinois*, 136 S. Ct. 399 (2015) (No. 14-9504), 2015 WL 3452842.

Children's Action Alliance is an independent voice for Arizona children at the state capitol and in the community. CAA works to improve children's health, education and security through information and action.

Children's Defense Fund-New York is dedicated to improving conditions for children, combining research, public education, policy development, community organizing and advocacy. A recognized authority in the endeavor to protect children and strengthen families, CDF-NY serves as a resource and partner for children, families and organizations throughout New York City and State.

Children's Law Center of Kentucky has worked on behalf of adolescents in a variety of settings, including adolescents involved in the juvenile and criminal justice systems. The Children's Law Center, Inc. (CLC) is a non-profit organization

committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for youth and advocating for systemic and societal change. For nearly 30 years, CLC has worked in many settings, including the fields of special education, custody, and juvenile justice, to ensure that youth are treated humanely, can access services, and are represented by counsel. The Children's Law Center has been involved since 2005 in strengthening Indiana's system of indigent juvenile defense by improving access to counsel, quality of representation, and the impediments which assure that all youth have competent and effective lawyers. The Center has partnered with the Indiana Public Defender Council to promote fair and constitutionally sound policies relative to the treatment of youth in the delinquency system.

Children's Rights is a national non-profit advocacy organization dedicated to improving the lives of vulnerable children in child welfare, juvenile justice and public health systems. Children's Rights uses civil rights litigation, policy expertise, and public education to create positive systems change, with a 20-year track record in raising accountability, protecting rights, and improving outcomes for children. In particular, Children's Rights has significant experience in addressing systemic barriers that contribute to known harm and grave outcomes for youth when they leave state custody as young adults. As part of its work, Children's Rights advocates for children who have become involved in juvenile justice proceedings, many of whom also have been placed in foster care as a result of abuse or neglect, and many of whom suffer from significant

mental health disorders. Children's Rights has particular concerns about the long-lasting adverse effects that these youth will suffer as a result of excessive and inappropriate punishment.

Citizens' Committee for Children of New York, Inc. (CCC) is an over 70-year old multi-issue independent advocacy organization whose mission is to ensure every New York child is healthy, housed, educated and safe.

The **Civitas ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and child-serving professional to advocate for the well-being of youth in their professional careers, with an ultimate goal of promoting justice for children, adolescents and young adults. For a decade, The ChildLaw Center served as the lead entity for juvenile justice reform in Illinois as part of the MacArthur Foundation's Models for Change initiative. That initiative worked to promote a more effective, fair and developmentally sound juvenile justice system.

The **Coalition for Juvenile Justice (CJJ)** is a non-profit, non-partisan, nationwide coalition of State Advisory Groups (SAGs), allied staff, individuals, and organizations. CJJ is funded by our member organizations and through grants secured from various agencies. CJJ envisions a nation where fewer children are at risk of delinquency; and if they are at risk or involved with the justice system, they and their families receive every possible opportunity to live safe, healthy, and fulfilling lives. CJJ serves and supports SAGs that are principally responsible for monitoring and supporting their state's progress in addressing the four core requirements of the Juvenile Justice and Delinquency Prevention Act

(JJDPA) and administering federal juvenile justice grants in their states. CJJ is dedicated to preventing children and youth from becoming involved in the courts and upholding the highest standards of care when youth are charged with wrongdoing and enter the justice system.

The **Education Law Center-PA (ELC)** is a non-profit, legal advocacy organization dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through individual and impact litigation, as well as advocacy at the local, state and national level, ELC advances the rights of vulnerable children, including children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English language learners, LGBTQ students, and children experiencing homelessness. Over its 40-plus-year history, ELC has advocated vigorously to dismantle the school-to-prison pipeline in all of its forms through individual representative, class action lawsuits, and systemic policy reforms. ELC joins as amicus in this matter because we know the devastating impact and harsh consequences of fines imposed on youth in the truancy context, often pushing them further into the juvenile and criminal justice systems.

The **Florida Juvenile Resentencing and Review Project** at the Florida International University College of Law was founded in 2015 following the legislative enactment of Chapter 2014-220, Law of Florida, and the release of this Court's opinions in Falcon v. State, 162 So. 3d 954 (Fla. 2015) and Horsley v. State, 160 So. 3d 393 (Fla. 2015). The Resentencing and Review Project was created with the goal of ensuring that each juvenile in the State of

Florida who is either already serving or subject to adult sanctions as well as those entitled to judicial review receive a robust and comprehensive defense.

The **Georgetown Juvenile Justice Clinic** was founded in 1973 to represent children accused of misdemeanor and felony offenses in the District of Columbia. Clinic faculty, fellows, and students provide highly effective holistic representation to their clients by protecting the rights and interests of youth in the juvenile justice system, advocating on behalf of youth in related proceedings such as special education and school disciplinary hearings, and lobbying for mental health services, drug treatment, and other interventions that are appropriately matched with the child's age, mental capacity, and developmental stage. Clinic faculty and alumni engage in local, regional, and national juvenile justice reform by training defenders throughout the country, developing local and national juvenile justice standards for lawyers and other stakeholders, writing and updating practice manuals, conducting research and publishing law review articles and books that analyze the need for reform and consulting with local and state officials to advance reform efforts. With an emphasis on racial justice reform in its recently launched Juvenile Justice Initiative, faculty and staff also write scholarship, convene symposia and trainings, and develop resources to help juvenile justice stakeholders identify and correct racial bias and injustices throughout the system.

The **Harvard Law School's Child Advocacy Program (CAP)** is a premier academic program focused on children's rights, primarily in the areas child welfare (abuse and neglect, foster care, and adoption), education, and juvenile justice. CAP trains

students to contribute in their future careers to a better understanding of the rights of children, and to law and policy reform promoting children's rights in the United States and around the world. CAP's Faculty director is Elizabeth Bartholet, the Morris Wasserstein Public Interest Professor of Law. She is a leading national authority on child protection, foster care, and adoption law.

The **Judge David L. Bazelon Center for Mental Health Law** is a national public interest organization founded in 1972 to advance the rights of individuals with mental disabilities. The Center advocates for laws and policies that protect the civil rights of and provide equal opportunity to children and adults with mental disabilities. It works to improve juvenile and adult corrections systems and has seen first-hand the damage to children and families wrought by excessive fines.

The **Justice for Children Project** is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Since January 1998, the Project has worked to study the ways in which the law and legal reform may be used to redress systemic problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Clinic and through its amicus work, the Justice for Children Project strives to

advance the cause of children's rights in delinquency, status offense, child welfare, immigration, and other legal proceedings affecting children's interests.

The **Juvenile Justice Coalition** is an Ohio state advocacy organization that works with directly impacted youth to advance research-based reforms for youth involved in the state's juvenile courts and youth who are suspended or expelled from school.

Lawyers For Children (LFC) is a not-for-profit legal corporation dedicated to protecting the rights of individual children in foster care in New York City and compelling system-wide child welfare reform. Since 1984, LFC has provided free legal and social work services to children in more than 30,000 court proceedings involving foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody and visitation. This year, our attorney-social worker teams will represent children and youth in close to 3,000 court cases in New York City Family Courts. A significant number of those youth are "cross-over" youth, appearing in both child welfare and criminal/delinquency matters.

Legal Aid Society Juvenile Rights Practice: The Legal Aid Society is the oldest and largest not-for-profit legal services organization in the nation, dedicated since 1876 to providing quality legal representation to low-income New Yorkers. The Juvenile Rights Practice ("JRP") is the primary institutional provider of legal services for children in New York, and it represents 90 percent of the children—34,000 children annually—who appear before the Family Court in New York City on child protective, termination of parental rights, PINS (person in need of supervision), and juvenile delinquency petitions. The JRP was established

concurrently with New York State's Family Court in 1962 (five years before the U.S. Supreme Court ruled that children have a constitutional right to counsel at government expense), and it was one of the first organizations in this country to represent children in a juvenile court. Since then, the JRP has grown into one of the nation's leading organizations in the field of child advocacy.

Louisiana Center for Children's Rights (LCCR) is the only statewide, non-profit advocacy organization focused on reform of the juvenile justice system in Louisiana. Its advocacy over the years has focused on the way the state handles court involved youth, and pays particular attention to the high rate of juvenile incarceration in Louisiana and the conditions under which children are incarcerated. Through direct advocacy, research and cooperation with state run agencies, LCCR works to both improve conditions of confinement and identify sensible alternatives to incarceration. LCCR also works to ensure that children's rights are protected at all stages of juvenile court proceedings, from arrest through disposition, post-disposition and appeal, and that the juvenile and adult criminal justice systems take into account the unique developmental differences between youth and adults in enforcing these rights. LCCR continues to work to build the capacity of Louisiana's juvenile public defenders by providing support, consultation and training, as well as pushing for system-wide reform and increased resources for juvenile public defenders.

The National Center for Youth Law (NCYL) is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights

of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. One of NCYL's priorities is to reduce the number of youth subjected to harmful practices in the juvenile justice system, including the imposition of illegal juvenile fines and fees. NCYL has litigated to end unnecessary referral to the juvenile justice system in numerous states, and advocated at the federal, state, and local levels to reduce reliance on the justice systems to address the needs of youth, including eliminating juvenile fines and fees, decriminalizing normal adolescent behavior and improving children's access to adequate developmentally-appropriate treatment.

The National Juvenile Defender Center (NJDC) was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs, and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural, and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination. NJDC has participated as Amicus Curiae before the United

States Supreme Court, as well as federal and state courts across the country.

The **National Juvenile Justice Network (NJJN)** leads a movement of state-based juvenile justice reform organizations and alumni of its Youth Justice Leadership Institute to fight for a fairer youth justice system that's appropriate for youth and their families. NJJN advocates for policies and practices that treat youth in trouble with the law with dignity and humanity and which strengthen them, their families and their communities. Founded in 2005, NJJN is currently comprised of 53 organizational members in 43 states and the District of Columbia and a growing cadre of graduates from our Youth Justice Leadership Institute.

NJJN recognizes that youth are still developing, are fundamentally different from adults and should be held accountable in a developmentally appropriate manner that gives them the tools to make better choices in the future and become productive citizens. Unfortunately, many states are saddling youth involved with the justice system with excessive fines and fees that act as a millstone around their necks, thwarting their efforts to become productive citizens. Youth and their families throughout the nation are at risk of serious harm—which is disproportionately placed on youth of color who are overrepresented in the youth justice system, unless the Court incorporates the Excessive Fines Clause against the states.

The **Nova Southeastern University Law Center Children and Families Clinic** has represented parents and children in domestic relations case and abuse and neglect matters for the past twenty years. Under the supervision of faculty

member, Clinic students represent children on a pro bono basis in abuse, neglect, and termination of parental rights cases when asked to do so by the court or parties—as children have no right to counsel in such proceedings in Florida. The Clinic has signed on to amicus briefs in Florida and nationally because of its experience in representing children where serious rights are at stake and where, in the absence of independent counsel, serious harm would come to the children.

PolicyLink is a national research and action institute advancing racial and economic equity with a focus on advancing an equitable economy, healthy communities of opportunity, and a just society for the 100 million people living in poverty. To this end, PolicyLink has prioritized addressing the disproportionate impact fines and fees have on the financial security and economic mobility of low-income communities and communities of color.

Robert F. Kennedy Human Rights is a nonprofit organization that was founded in 1968 to carry on Robert F. Kennedy's commitment to creating a more just and peaceful world. The organization works alongside local activists to ensure lasting positive change in governments and corporations. Its team includes leading attorneys, advocates and entrepreneurs united by a commitment to social justice. Whether in the United States or abroad, the organization's programs have pursued strategic litigation on key human rights issues, educated millions of students in human rights advocacy and fostered a social good approach to business and investment. Its advocacy and litigation program seeks to ensure that the United States respects, protects, and fulfills its international human rights obligations

with respect to its juvenile and criminal justice systems, including providing enhanced protections for children in conflict with the law, ending discriminatory police practices, curbing the over reliance on incarceration, and eliminating unjust and inefficient cash bail and pre-trial detention policies that disproportionately affect the poor and communities of color. Robert F. Kennedy Human Rights has organized thematic hearings before the Inter-American Commission on Human Rights on impunity for police killings and excessive use of force by the police in the United States. In addition to holding the United States accountable before international human rights mechanisms, Robert F. Kennedy Human Rights works with domestic activists to reform the criminal justice system via policy change, innovative disruptions that bolster the case for reform and public engagement and mobilization.

The **Roderick and Solange MacArthur Justice Center (MJC)** is a non-profit, public interest law firm that advocates positive reform within the criminal justice system. MJC has offices in Chicago (at the Northwestern Pritzker School of Law), New Orleans, St. Louis, at the University of Mississippi Law School, and in Washington, D.C.. MJC was founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. It has led battles against myriad civil rights injustices, including police misconduct, racial bias in the criminal justice system, denial of counsel for the indigent accused, and improper treatment of court-involved youth.

RYSE is located in Richmond, CA and engages youth and young adults ages 13-24 in programming that includes direct services, education awareness,

leadership-building, and organizing, and in the areas of health and wellness; education and justice; leadership and community building; and media, arts & culture. Over 3500 young people have participated in programming since RYSE opened in 2008 and RYSE has been recognized by local, statewide, and national efforts as an emerging model and best practice in the fields of youth leadership, youth violence prevention, and community health.

The **Sentencing Project,** founded in 1986, is a national nonprofit organization engaged in research and advocacy on criminal justice and juvenile justice reform. The organization is recognized for its policy research documenting trends and racial disparities within the justice system, and for developing recommendations for policy and practice to ameliorate those problems. The Sentencing Project has produced policy analyses that document the increasing use of sentences of life without parole for both juveniles and adults, and has assessed the impact of such policies on public safety, fiscal priorities, and prospects for rehabilitation. Staff of the organization are frequently called upon to testify in Congress and before a broad range of policymaking bodies and practitioner audiences.

The **Southern Center for Human Rights (SCHR)** is working for equality, justice, and dignity in our criminal justice system. The mission of SCHR is to end capital punishment, mass incarceration, and other criminal justice practices that are used to control the lives of poor people, people of color, and other marginalized groups in the Southern United States. SCHR does this through death penalty representation, impact litigation, policy advocacy, and public education.

The **Stephen and Sandra Sheller Center for Social Justice** at Temple University Beasley School of Law engages in systemic advocacy on behalf of disadvantaged and marginalized groups. The Center has a strong commitment to the welfare of children and families and has conducted extensive advocacy on their behalf, including a successful effort to end Philadelphia's practice of charging parents for the cost of their child's incarceration. By participating as *amicus*, the Center seeks to assist the Court as it considers the damaging effects of excessive fees and fines on families, as well as the constitutional issues at stake in this litigation.

Tennessee Voices for Children supports sensible and effective changes that reduce fines, because it will reduce further penetration of juveniles in the juvenile and criminal justice systems.

Youth Advocate Programs, Inc. (YAP) is a non-profit, direct services organization founded in 1975. Our mission is to provide individuals who are, have been or may be subject to compulsory care with the opportunity to develop, contribute and be valued as assets so that communities have safe, proven effective and economical alternatives to institutional placement. Our philosophy stems from the premise that every individual and family has strengths and capabilities that can and must be developed. Our core agency principles guide this premise into practice and reflect our ongoing commitment to family-focused programming that empowers youth and families to lead healthy, safe and productive lives in their communities. We recognize that strong families make strong communities, and oppose the incarceration of youth. YAP serves over 11,000 youth and families per year, specializing in youth who present the most

challenging cases. The agency provides child welfare, mental health and juvenile justice systems with cost-effective alternatives to residential, correctional and other out-of-home placements.

The **Youth Law Center (YLC)** is a public interest law firm that advocates to transform juvenile justice and foster care systems across the nation so that every child and youth can thrive. YLC has long worked to ensure that the juvenile and criminal justice systems are informed by research on adolescent development and responsive to the particular needs and vulnerabilities of youth. Since 1978, our lawyers have been involved in public policy discussions, legislation and court challenges involving the treatment of juveniles in the juvenile and criminal justice systems. The Center's attorneys are often consulted on juvenile policy matters, and have participated as amicus curiae in cases around the country involving important juvenile system issues. Youth Law Center attorneys have written widely on a range of juvenile justice, child welfare, health and education issues, and have provided research, training, and technical assistance on legal standards and juvenile policy issues to public officials in almost every state.

The **Youth Sentencing & Reentry Project (YSRP)** is a nonprofit organization based in Philadelphia that uses direct service and policy advocacy to transform the experiences of children prosecuted in the adult criminal justice system, and to ensure fair and thoughtful resentencing and reentry for individuals who were sentenced to life without parole as children ("juvenile lifers"). YSRP partners with court-involved youth and juvenile lifers, their families, and lawyers to develop holistic,

humanizing narratives that mitigate the facts of each case; get cases transferred to the juvenile system or resentenced; and make crucial connections to community resources providing education, healthcare, housing, and employment. YSRP also provides trainings on mitigation, and recruits, trains and supervises students and other volunteers to assist in this work. YSRP's ultimate goals are to keep children out of adult jails and prisons and to enhance the quality of representation juvenile lifers receive at resentencing, and as they prepare to reenter the community. YSRP is particularly interested in the issue of costs and fees imposed on court-involved youth and families as this is an issue that we have addressed in Philadelphia.

Western Center on Law & Poverty is the oldest and largest statewide support center for legal services advocates in California. Western Center represents California's poorest residents in litigation to advance access to housing, health, public benefits, jobs and justice. Western Center has frequently represented clients challenging government fines and fees, including juvenile court fees, that are imposed in an unconstitutional manner. Ensuring that the prohibition against excessive fines set forth in the Eighth Amendment of United States Constitution applies to State court fines is critical to Western Center's anti-poverty mission.

APPENDIX B: MONETARY PENALTIES LABLED AS FINES

Alabama	ALA. CODE § 12-15-215(a)(4) (authorizing assessment of fine not to exceed $250)
Arizona	ARIZ. REV. STAT. ANN. § 8-341(S) (mandating assessment of fine between $300 and $1,000 for enumerated offenses)
Arkansas	ARK. CODE § 9-27-330(a)(8) (authorizing fine of up to $500)
California	CAL. WELF. & INST. CODE § 730.5 (authorizing fine up to the amount that would be imposed on adult upon criminal conviction of same offense)
Colorado	COLO. REV. STAT. ANN. § 19-2917 (authorizing fine up to $300 for aggravated juvenile offender)
Delaware	DEL. CODE ANN. tit. 10, § 1009A (authorizing fine as a term of probation in accordance with Section 4218 of the Delaware Criminal Code)
Florida	FLA. STAT. ANN. § 806.13 (mandating assessment of fine between $250 and $1,000 against youth adjudicated delinquent for criminal mischief)
Georgia	GA. CODE ANN. §§ 15-11-601(a)(8), 15-11-630(g)(4) (authorizing fine up to the amount that would be imposed on an adult for a like offense, when youth is adjudicated

	delinquent for enumerated offenses)
Hawaii	HAW. REV. STAT. § 571-48(1)(D) (authorizing fine for violation which would be theft in the third degree if committed by an adult)
Idaho	IDAHO CODE ANN. § 20-549 (mandating $150 fine for curfew violation by a juvenile offender)
Illinois	705 ILL. COMP. STAT. 405/5-615(11) (authorizing fine between $25 and $100 for tobacco offenses); 705 ILL. COMP. STAT. 410/25(e) (authorizing assessment of fines against youth taking part in the juvenile drug court program)
Kansas	KAN. STAT. ANN. § 38-2361(a)(8), (e) (authorizing fine up to $1000 for each offense)
Kentucky	KEN. REV. STAT. § 635.085(1) (authorizing fine between $100 and $500 in lieu of detention)
Louisiana	LA. STAT. § 95.8(B) (mandating fine between $100 and $1,000 for illegal possession of handgun by juvenile)
Maine	ME. REV. STAT. ANN. tit. 15, § 3314(1)(G) (authorizing fine up to $1,000)
Maryland	MD. CODE § 3-8A-19(e) (authorizing fine between $25 and $100 for enumerated motor vehicle and possession offenses)
Massachusetts	MASS. GEN. LAWS ch. 119, § 58B (authorizing fine for violation of

	motor vehicle code that results in delinquency adjudication)
Michigan	MICH. COMP. LAWS ANN. § 712A.18(1)(j) (authorizing fine in the same amount that may be assessed against adult)
Minnesota	MINN. STAT. § 260B.198 sub. 1(6) (authorizing fine up to $1,000)
Mississippi	MISS. CODE. § 43-21-605(1)(e) (authorizing fine up to $500)
Missouri	MO. ANN. STAT. § 211.181(3)(9) (authorizing fine up to $25 for act that would be a misdemeanor if committed by an adult and up to $50 for act that would be a felony if committed by an adult)
Montana	MONT. CODE ANN. § 41-5-1513(1)(f) (authorizing fine for act that would be criminal offense if committed by an adult)
Nevada	NEV. REV. STAT. § 62E.730(1) (authorizing imposition of fine against youth and parent or guardian)
New Hampshire	N.H. REV. STAT. § 169-B:19 (I)(a) (authorizing fine up to $250)
New Jersey	N.J. STAT. ANN. § 2A:4A-43(b)(8) (authorizing fine in an amount not to exceed the maximum that could be imposed on adult convicted of criminal offense)
New Mexico	N.M. STAT. ANN. § 32A-2-19(B) (authorizing fine in an amount not to exceed the maximum that could

	be imposed on adult convicted of criminal offense)
North Carolina	N.C. GEN. STAT. § 7B-2506(5) (authorizing fine in an amount not to exceed the maximum that could be imposed on adult convicted of criminal offense)
North Dakota	N.D. CENT. CODE § 27-20-31(3) (authorizing fine for enumerated offenses)
Ohio	OHIO REV. CODE ANN. § 2152.20(A)(1) (authorizing fine between $50 and $2,000, depending on the offense)
Oklahoma	OKLA. STAT. ANN. tit. 10A, § 2-2-503(A)(7)(d) (authorizing fine in an amount not to exceed the maximum that could be imposed on adult convicted of criminal offense)
Oregon	OR. REV. STAT. ANN. § 419C.459 (authorizing fine of the same amount that could be imposed on adult convicted of criminal offense, including mandatory application of minimum fines)
Pennsylvania	42 PA. CONS. STAT. ANN. § 6352(a)(5) (authorizing assessment of fine)
Rhode Island	R.I. GEN. LAWS § 14-1-4 (mandating fine of up to $500 for "idleness")
South Carolina	S.C. CODE § 63-19-1410 (authorizing fine of up to $200 as a condition of probation)

South Dakota	S.D. CODIFIED LAWS 26-8C-7(2) (authorizing fine up to $1,000)
Tennessee	TENN. CODE § 37-1-131(a)(5) (authorizing fine up to $50 for each offense)
Utah	UTAH CODE § 78A-6-602(2)(e)(i) (authorizing fine up to $250 as condition of nonjudicial adjustment)
Virginia	VA. CODE § 16.1-278.8(A)(8) (authorizing fine up to $500)
Washington	WASH. REV. CODE § 7.68.035(2) (authorizing fines for certain offenses)
West Virginia	W. VA. CODE § 49-4-715(a)(1) (authorizing fine up to $100)
Wisconsin	WIS. STAT. ANN. § 938.34(8) (authorizing fine in an amount not to exceed the maximum that could be imposed on adult convicted of criminal offense, or up to $100 if the violation is applicable only to a person under 18 years of age)
Wyoming	WYO. STAT. ANN. § 14-6-247(a)(vi) (authorizing fine in an amount not to exceed the maximum that could be imposed on adult convicted of criminal offense)

APPENDIX C: PROBATION FEES

Arizona	ARIZ. REV. STAT. ANN. § 8-241(A) (mandating that parent pay not less than $50 per month for supervision)
Arkansas	ARK. CODE § 9-27-330(a)(5) (authorizing assessment of probation fee not to exceed $20 per month)
Colorado	COLO. REV. STAT. ANN. §§ 19-2-925(2)(k), 24-4.2-104 (levying supervision fees against juvenile)
Connecticut	CONN. GEN. STAT. ANN. § 46b-141c (authorizing Judicial Department to require full or partial reimbursement of supervision fees from parents or guardians of child on probation)
Florida	FLA. STAT. ANN. §§ 985.514(2), 985.039 (requiring that court assess supervision fee of $1 per day against parents)
Georgia	GA. CODE ANN. § 15-11-37(b) (authorizing initial court supervision fee of between $10 and $200 and additional monthly fee of between $2 and $30, for which child and parent, guardian, or custodian are jointly and severally liable)
Idaho	IDAHO CODE ANN. § 20-522 (establishing probationary contract that may include term holding parent, guardian, or custodian liable for up to $1,000 if child breaches probation terms)

Illinois	705 ILL. COMP. STAT. 405/5-615(10) (mandating $50 monthly supervision fee assessed against the child)
Indiana	IND. CODE §31-40-2-1(a) (authorizing assessment of initial probation user's fee of between $25 and $100 plus additional monthly fee of between $10 and $25, assessed against parent, guardian, or custodian)
Kansas	KAN. STAT. ANN. § 38-2324(a) (rendering parent liable for probation services)
Kentucky	KY. REV. STAT. ANN. § 610.180 (assessing $500 against parent as surety during probation)
Louisiana	LA. CHILD CODE arts. 897(B)(2)(g), 899(B)(2)(g) (authorizing court to require that child pay a supervision fee between $10 and $100 per month)
Michigan	MICH. COMP. LAWS ANN. §§ 712A.18(1)(b), 712A.18m(1) (requiring that court order juvenile to pay $50 or $68 to cover state costs as condition of probation or supervision)
North Carolina	N.C. GEN. STAT. § 7B-2704(2) (authorizing assessment of probation supervision fee against parents)
Oklahoma	OKLA. STAT. ANN. tit. 10A, § 2-2-503(A)(1) (authorizing $25 monthly fee assessed against child, parent, or guardian)

Oregon	OR. REV. STAT. ANN. §§ 419C.446, 419C.449 (authorizing assessment of supervision fee fixed by the county juvenile department)
Ohio	OHIO REV. CODE ANN. § 2152.02(A)(4)(a) (authorizing court to assess the costs of implementing community control against the child)
Texas	TEX. FAM. CODE § 54.061(a) (authorizing assessment of monthly fee up to $15 against child, parent, or other person)
Washington	WASH. REV. CODE § 13.40.054 (authorizing court to order juvenile to post a probation bond or deposit cash in lieu of bond)

APPENDIX D: INCARCERATION FEES

Alabama	ALA. CODE §§ 12-15-109 (requiring parent who was made party to proceeding pay cost of child's incarceration); 12-15-215(f) (requiring child support payments when child placed in legal custody of agency)
Alaska	ALASKA STAT. ANN. § 47.12.230(a) (requiring child support payment when minor is committed)
Arizona	ARIZ. REV. STAT. ANN. §§ 8-243(B)-(C) (authorizing payments for maintenance of child in juvenile detention facility)
Arkansas	ARK. CODE ANN. § 9-27-330(a)(13) (authorizing cost of detention for juveniles)
Colorado	COLO. REV. STAT. ANN. § 19-2-114(1)(a) (authorizing cost of care when juvenile sentenced to placement outside of home)
Connecticut	CONN. GEN. STAT. ANN. § 46b-130 (requiring reimbursement to state by parents when minor child has been provided with care or supports)
Florida	FLA. STAT. ANN. § 985.514(1) (requiring fees when child placed in detention or other placement)
Georgia	GA. CODE ANN. § 15-11-36(c) (authorizing cost of care when child committed by court)

Hawaii	HAW. REV. STAT. § 571-51 (authorizing cost of care and treatment)
Idaho	IDAHO CODE ANN. § 20-524(1) (authorizing payment for support and treatment of juvenile in custody)
Indiana	IND. CODE. ANN. § 31-40-1-3.8 (authorizing payments by parents for cost of placement of child)
Iowa	IOWA CODE ANN. § 232.141 (authorizing cost of care payments)
Kansas	KAN. STAT. ANN. 38-2315(b) (authorizing court to order reimbursements to county by parents for cost of care)
Kentucky	KY. REV. STAT. ANN. § 610.170 (authorizing child support payments from parents when child is placed in Department of Juvenile Justice custody)
Louisiana	LA. REV. STAT. ANN. 15:910 (authorizing cost of care when child is assigned to secure institution)
Maryland	MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-29 (authorizing child support payments)
Massachusetts	MASS. GEN. LAWS ANN. ch. 119, § 58 (authorizing payments for care and support of child)
Michigan	MICH. COMP. LAWS ANN. § 712A.18(2) (requiring payments reimbursing court for cost of care

	and support of child placed outside home)
Minnesota	MINN. STAT. ANN. § 260B.331 sub. (requiring reimbursement to county for cost of care)
Mississippi	MISS. CODE § 43-21-615(2) (authorizing payments for support of child committed to custody by youth court)
Missouri	MO. ANN. STAT. § 211.134 (authorizing court to order payments to support institutionalized child)
Montana	MONT. CODE § 41-5-1304(3) (authorizing court to assess cost of care, supervision, treatment, and detention for youth)
Nebraska	NEB. REV. STAT. § 43-290 (authorizing court to charge parents when child placed with state agency)
Nevada	NEV. REV. STAT. §§ 62E.210(2); 62B.120 (authorizing court to charge parents when child committed to Division of Child and Family Services)
New Hampshire	N.H. REV. STAT. ANN. § 169-B:40(I)(C) (authorizing payments from parents for placement expenses)
New Mexico	N.M. STAT. ANN. § 32A-2-28(C) (requiring parents to pay costs of child's institutionalization)

North Carolina	N.C. GEN. STAT. ANN. § 7B-2704(1) (authorizing child support payments when child adjudicated delinquent)
North Dakota	N.D. CENT. CODE ANN. § 27-20-49(1)(b) (authorizing payments from parents when child committed to public agency)
Ohio	OHIO REV. CODE ANN. § 2152.20(D) (authorizing court to order reimbursement by child of costs incurred from confinement in detention facility.)
Oregon	OR. REV. STAT. ANN. § 419C.590(1) (authorizing court to order payments toward support of youth offender in the jurisdiction of the court)
Pennsylvania	62 PA. CONS. STAT. ANN. § 704.1. (authorizing court to order payment from parents or other legal guardians for child's placement costs).
South Carolina	S.C. CODE ANN. § 63-19-1680 (authorizing court to order child support payments for detained children)
Texas	TEX. FAM. CODE ANN. § 54.032(e), (g), (h) (authorizing two separate $10 or $20 program fee assessments against children diverted to teen court program)

Tennessee	TENN. CODE ANN. § 37-1-151 (authorizing court to collect child support from parents when child is in state custody)
Texas	TEX. FAM. CODE ANN. § 54.06(a) (authorizing court to collect child support from parents when child placed outside of home)
Vermont	VT. STAT. ANN. tit. 33, § 5116 (authorizing court to collect child support from parents when child placed outside of home)
Virginia	VA. CODE ANN. §§ 16.1-290 (authorizing Department of Social Services to collect child support when child placed in their custody)
Utah	UTAH CODE § 78A-6-1207 (authorizing assessment of fee not to exceed $50 for youth diverted to youth court)
Washington	WASH. REV. CODE ANN. § 13.40.220(1) (authorizing collection of payments from parents or guardians when child is confined)
West Virginia	W. VA. CODE ANN. § 49-4-714(b)(4) (authorizing court to collect child support payments when child placed in custody of government agency)
Wisconsin	WIS. STAT. ANN. § 938.275 (authorizing cost of detention and post-adjudication placement)

No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS CURIAE

From its earliest advocacy led by Justice Thurgood Marshall, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") has strived to secure the constitutional promise of equality for all people. Petitioner asks the Court to consider an important question about the Fourteenth Amendment's reach, which, more than any other constitutional provision, embodies our Nation's commitment to equal justice under the law.

Since its founding close to 80 years ago, LDF has been at the forefront of efforts to enforce the Fourteenth Amendment's promise of equality. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Loving v. Virginia*, 388 U.S. 1 (1967). LDF submits this brief to help the Court decide whether the Fourteenth Amendment's Due Process Clause incorporates the Eighth Amendment's Excessive Fines Clause. LDF also submits this brief to propose an approach to incorporation that more closely aligns with the anti-subordination principle at the core of the Fourteenth Amendment.[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION

150 years ago, the Nation faced a defining moment. A bloody Civil War about whether Southern States would be able to continue to enslave Black people had torn the country in two. After defeating the Confederacy, at a cost of more than 600,000 lives,[2] the Union had to devise a way not only to guarantee formerly enslaved Black people equal rights, but also to protect these newly-won rights from Southern aggression.

Congress began by adopting the Thirteenth Amendment to end slavery, which the States ratified. The Southern States responded to slavery's abolition by enacting the Black Codes—laws designed to repress African Americans and recreate slavery-like conditions. To combat the Black Codes, Congress passed the Civil Rights Act of 1866, which gave the Federal Government power to protect the civil rights of Black Americans. But there was a question of the Act's constitutionality, so Congress proposed another constitutional amendment to remedy that concern: The Fourteenth Amendment.

The Fourteenth Amendment had two important purposes. One, it guaranteed equal rights to all people in all States, particularly African Americans. Two, it provided the Federal Government with the power to protect these rights should States try to infringe on

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[2] *See* Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES (Apr. 2, 2012), https://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html.

them. Congress designed the Amendment to radically shift the federal-state balance of power. The States ratified the Fourteenth Amendment on July 28, 1868.

This Court has held that the first section of the Fourteenth Amendment incorporates at least some of the Bill of Rights against the States, although there has been disagreement over whether incorporation is proper under the Amendment's Due Process Clause or Privileges and Immunities Clause. *See McDonald v. City of Chicago*, 561 U.S. 742, 754-767 (2010) (recounting the various approaches to incorporation). It is almost universally accepted, however, that the incorporation analysis must begin by putting the Amendment in its historical context and examining the intent of the Framers. *See, e.g.*, *id.* at 778 (looking at what the Framers "counted" as a "fundamental right[]"); *id.* at 842 (Thomas, J., concurring) (looking at what the Framers "understood"); *id.* at 863 (Stevens, J., dissenting) (looking at the "historical evidence" of what the Framers "thought"); *id* at 918 (Breyer, J., dissenting) (taking "account of the Framers' basic reason[ing]").

The Framers intended the Fourteenth Amendment to be a bulwark against States infringing on citizens' civil rights, with special attention to the invidious tactics Southern States used to strip African Americans of their rights. As a result, a critical question that the Court should ask during an incorporation inquiry is whether the right at issue protects against the kind of tactics Southern States used to repress Black people in the post-Civil War

period. If the right does, then the Framers would have intended for it to be incorporated against the States.

Under this test, the Court should hold that the Eighth Amendment Excessive Fines Clause is incorporated against the States. The Framers would have intended the constitutional protection against disproportionate financial punishment to apply equally across the country to ensure that States do not use debilitating fines and forfeitures as a tool to subjugate citizens.

The framework proposed in this brief also opens the door to reexamining other aspects of this Court's incorporation doctrine. Given that the Court has recognized a shift in its incorporation jurisprudence, and has incorporated most of the Bill of Rights, *see McDonald*, 561 U.S. at 764-65 & n.12, the Court should take the opportunity in appropriate cases to revisit its rulings refusing to incorporate three of the Bill of the Rights' guarantees. *See Hurtado v. California*, 110 U.S. 516 (1884) (refusing to incorporate Fifth Amendment's Grand Jury Clause); *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916) (same for Seventh Amendment civil jury trial right); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (same for Sixth Amendment unanimous jury verdict right).

Most pressing is the need for the Court to revisit *Apodaca*—its decision refusing to incorporate the Sixth Amendment right to a unanimous jury verdict in a criminal trial. *Apodaca* is inconsistent with this Court's current jurisprudence, as eight of the Justices

in *Apodaca* believed the Sixth Amendment applied to the States and the Federal Government equally, and the Court has repeatedly held the Sixth Amendment requires unanimity in federal criminal trials. *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 230 (2005); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Moreover, the *Apodaca* plurality opinion was based on the notion that there was no "proof" unanimity was needed to protect defendants from prejudice and ensure minority jurors have a voice during deliberations. Yet Louisiana and Oregon, the only states with non-unanimous jury provisions, specifically enacted the provisions to silence minority jurors and more easily convict minority defendants. Applying the incorporation lens proposed in this brief confirms that *Apodaca* was wrongly decided.

ARGUMENT

I. THE FOURTEENTH AMENDMENT WAS INTENDED TO GUARANTEE IMPORTANT RIGHTS TO ALL PEOPLE AND TO ACT AS A GUARD AGAINST STATES ABUSING THOSE RIGHTS.

In recent years, when determining whether to incorporate a provision of the Bill of Rights, the Court has put itself in the shoes of the "Framers and ratifiers of the Fourteenth Amendment" and asked whether they would have intended to incorporate the right against the States to maintain "our system of ordered liberty." *McDonald*, 561 U.S. at 778. When undertaking this inquiry, the Court has considered

contemporaneous congressional statements.[3] It has also placed the Amendment in context by looking at the "history that the [framing] generation knew." *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008).[4] Thus, the starting place for an incorporation question is the history of the Fourteenth Amendment.

After the Civil War, "Congress was [called] to devise a formula, in which the South would acquiesce, 'to secure in a more permanent form the dear bought victories achieved in the mighty conflict.'"[5] As Massachusetts Senator Henry Wilson said, the goal was to ensure that "the curse of civil war may never be visited upon us again."[6] The Reconstruction Congress was determined to secure "lawful liberty"

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[3] *See, e.g.*, *McDonald*, 561 U.S. at 772 (quoting statements of Sen. Henry Wilson); *id.* at 775 (quoting statements of Rep. John Bingham); *id.* (quoting statements of Sen. Samuel Pomeroy); *District of Columbia v. Heller*, 554 U.S. 570, 616 (2008) (quoting statements of Sen. Davis and Rep. Nye).

[4] *See also McDonald*, 561 U.S. at 745 (taking a "survey of the contemporaneous history" of the Fourteenth Amendment); *id.* at 762 (looking at "[e]vidence from the period immediately following the ratification of the Fourteenth Amendment"); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (looking at the "history and experience" of "[t]hose who wrote our constitutions," when deciding whether the Sixth Amendment jury trial right is incorporated against the States).

[5] WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 44 (1995) (quoting Governor's Message, *Des Moines Iowa State Register*, p.3 col. 7 (Jan. 15, 1868)).

[6] CONG. GLOBE, 38th Cong., 1st sess. 1203 (1864) (statement of Sen. Henry Wilson).

"in all the states of the Union, and to all the people, white and black alike."[7]

To that end, almost immediately after the War, the country ratified the Thirteenth Amendment, abolishing slavery.[8] Still, the Southern States were unwilling to end the institution. As one Southern legislator wrote Ohio Senator John Sherman, the South was "determined to do by policy what [it] had failed to do with arms."[9] Although many Southern whites "conceded that blacks were no longer slaves of individual masters," they "intended to make them slaves of society."[10] As a Union Army commander in Virginia put it: Southern whites wanted to reduce Black people "to a condition which will give the former masters all the benefits of slavery, and throw upon them none of its responsibilities."[11]

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[7] NELSON, *supra* note 5, at 43 (quoting *The Source of Mr. Steven's Power*, N.Y. EVENING POST, p.3 col 1 (Mar. 14, 1866)).

[8] *See 13th Amendment to the U.S. Constitution: Abolition of Slavery, America's Historical Documents*, NAT'L ARCHIVES, https://www.archives.gov/historical-docs/13th-amendment (last visited Sep. 4, 2018).

[9] NELSON, *supra* note 5, at 41 (Letter from Jesse Shortess to John Sherman, JOHN SHERMAN PAPERS, LIBRARY OF CONGRESS, Washington, D.C. (Dec. 24, 1865)).

[10] Paul Finkelman, *This Historical Context of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 389, 400 (2004) (quotation marks omitted) ("*Historical Context*").

[11] NELSON, *supra* note 5, at 43.

To recreate a slavery-like existence, between 1865 and 1866,[12] Southern States passed "infamous black codes,"[13] "designed to replicate, as closely as possible, the pre-war suppression and exploitation of blacks."[14] "The Black Codes represented a legalized form of slavery in which each southern state perpetuated the master-slave relationship by passing apprenticeship laws, labor contract laws, vagrancy laws and restrictive travel laws . . . denying African Americans civil rights and due process of law."[15]

For example, Louisiana passed a law resembling "antebellum fugitive slave laws," which made it a crime to "persuade or entice away, feed, harbor or secret any person who leaves his or her employer."[16]

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[12] *See* John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 869 (1966).

[13] NELSON, *supra* note 5, at 43.

[14] Finkelman, *Historical Context*, *supra* note 10, at 402. *See also The Civil Rights Cases*, 109 U.S. 3, 36-37 (1883) (Harlan, J., dissenting) ("Recall the legislation of 1865-66 in some of the States, of which this court, in the Slaughterhouse Cases, said that it imposed upon the colored race onerous disabilities and burdens; curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value; forbade them to appear in the towns in any other character than menial servants; required them to reside on and cultivate the soil, without the right to purchase or own it; excluded them from many occupations of gain; and denied them the privilege of giving testimony in the courts where a white man was a party.").

[15] Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 55 n.62 (1995).

[16] Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 681-82 (2003) (quotation marks omitted).

Mississippi passed a law requiring Black people to "have a lawful home or employment" and then passed a vagrancy law that "allowed government authorities to auction off . . . any black who did not have a labor contract."[17] Georgia passed a vagrancy law that allowed "vagrants" to be "arrested and sentenced to work on the public roads . . . or be bound-out for up to a year to someone."[18] And Alabama's vagrancy law "allowed for the incarceration in the public workhouse of any laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause."[19] These laws, and many others like them, created a "new system of forced labor," reducing Black people "to a status somewhere between that of slaves (which they no longer were) and full free people (which most white southerners opposed)."[20]

The Southern campaign to subjugate Black people was not limited to repressive laws. It also included horrific and widespread violence. To that point, in 1866, several U.S. Military leaders testified to Congress about the pervasive violence perpetrated by whites against Blacks in the former Confederacy. Major General Clinton Fisk testified about Southern whites pursuing Black people "with vengeance and treat[ing] them with brutality."[21] Major General

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[17] *Id.* at 683 (quotation marks omitted).
[18] *Id.* (quotation marks omitted).
[19] *Id.* at 684 (quotation marks omitted).
[20] *Id.* at 685 (parentheticals omitted).
[21] *Id.* at 688.

Edward Hatch testified that Black people understood that they were "not safe from the poor whites," and that if they resisted the "reestablishment of bondage then they were liable to be shot."[22] When Lieutenant Colonel R.W. Barnard was asked if it was safe to remove Union troops from Tennessee, he responded by relating what someone else had told him: "I tell you what, if you take away the military from Tennessee, the buzzards can't eat up the niggers as fast as we'll kill 'em."[23] Massachusetts Senator Charles Sumner received a "box containing the finger of a black man," with a note that read, "'You old son of a bitch, I send you a piece of one of your friends.'"[24]

White abolitionists and Union sympathizers also faced Southern aggression.[25] White people were "thrown into prison" for telling freed Black people "they were rightfully entitled to vote."[26] Massachusetts Representative Benjamin Butler described the dire situation: "Northerners could not go South and argue the principles of free government without fear of the knife or pistol, or of being murdered by a mob."[27]

It was against this backdrop the Reconstruction Congress was compelled to act. It was clear that the

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[22] *Id.* at 687-88. (quotation marks omitted).
[23] *Id.* at 688 (quotation marks omitted).
[24] *Id.* at 685.
[25] *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 136 (1986).
[26] *Id.* at 135-36.
[27] NELSON, *supra* note 5, at 42 (quotation marks omitted).

Thirteenth Amendment could not sufficiently protect the rights of African Americans, and that a shift in the federal-state power balance was needed if Black people were to be protected. Thus, in December 1865, Congress formed the Joint Committee on Reconstruction. The Committee consisted of six Senators and nine Congressmen, who were charged with "investigat[ing] conditions in the South."[28] As part of its investigation, the Committee "interviewed scores of people—former slaves, former confederate leaders and slave owners, United States Army officers, and others in the South."[29]

Out of this Committee came the country's first attempt to pass a law aimed at remediating the abuses perpetrated in the South under the Black Codes—the Civil Rights Act of 1866.[30] The Act declared that "all persons" "of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right[s] in every State and Territory in the United States" and "full and equal benefit of all laws and proceedings . . . as enjoyed by white citizens."[31]

There were widespread concerns with the Act, however. Some, including President Andrew Johnson, questioned its constitutionality, believing that "the Constitution did not confer on Congress the power to

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[28] Finkelman, *Historical Context*, *supra* note 10, at 400.
[29] *Id.*
[30] Act of April 9, 1866, ch. 31, 14 Stat. 27.
[31] *Id.* § 1.

make rules to regulate the acts of states."[32] A contingent of congressmen agreed with President Johnson and bemoaned this lack of power, complaining that "the citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them."[33] Others thought that the Act, even if constitutional, did not go far enough; that the Act's protections could be easily rescinded should the political winds change.[34]

The Joint Committee thus did not stop with the Civil Rights Act. It also proposed a constitutional amendment.[35] "[T]he Committee concluded that nothing short of a Constitutional amendment—what became the Fourteenth Amendment—would protect the rights of the former slaves."[36] The Committee knew it was "framing an amendment of our fundamental law, which may exist for centuries without change."[37] The Committee also understood it was "making history, and laying foundations for our future national building."[38] This was going to be the amendment that "secur[ed] the fruits both of the war and of the three decades of antislavery agitation

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[32] John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1136 (1990).
[33] CURTIS, *supra* note 25, at 138-139.
[34] *See* CURTIS, *supra* note 25, at 55, 62-63, 86.
[35] Finkelman, *Historical Context*, *supra* note 10, at 400.
[36] *Id.* at 401.
[37] CONG. GLOBE, 39th Cong., 1st sess. 385 (1866) (statement of Rep. Jehu Baker).
[38] NELSON, *supra* note 5, at 45 (quotation marks omitted).

proceeding it."[39] To meet these goals, the Framers designed the amendment to: (1) guarantee all people, especially Black people, the privileges enshrined in the Bill of Rights, and (2) protect citizens' rights from potential State abuse.

When debating the proposed amendment, Ohio Congressman John Bingham—"The Father" of the Fourteenth Amendment[40]—explained that "the States of the Union [] have flagrantly violated the absolute guarantees of the Constitution of the United States to all its citizens."[41] He therefore declared that it was "time that [they] take security for the future, so that like occurrences may not again arise to distract our people and finally to dismember the Republic."[42]

Bingham later gave a speech "[i]n support of the proposed amendment to enforce the Bill of Rights."[43] Bingham made clear that an animating feature of the proposed amendment was that it would prohibit legislation "and practices that reduce groups to the

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[39] NELSON, *supra* note 5, at 61.

[40] Gerard N. Magliocca, *The Father of the 14th Amendment*, N.Y. TIMES (Sept. 17, 2003), https://opinionator.blogs.nytimes.com/2013/09/17/the-father-of-the-14th-amendment/.

[41] CONG. GLOBE, 39th Cong., 1st sess. 158 (1866) (statement of Rep. John Bingham).

[42] *Id.*

[43] *Id.* at 1088; *see* Speech of John A. Bingham, *In Support of the Proposed Amendment to Enforce the Bill of Rights* (Feb. 28, 1866), https://archive.org/stream/onecountryonecon00bing#page/n1.

position of a lower or disfavored caste."[44] Bingham declared that the amendment was "essential to the safety of all people of every State" as it "arm[s] the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today."[45]

Other key congressmen described the proposed amendment similarly. Representative Thaddeus Stevens explained that up until that point, the "Constitution limit[ed] only the action of Congress, and [was] not a limitation on the States. This amendment supplies that defect . . . ."[46] Senator Jacob Howard of Michigan pointed out that there was "no power given in the Constitution to enforce and to carry out any of the [Bill of Rights'] guarantees."[47] Thus, the "great object" of the proposed amendment was "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[48] Illinois Representative Jehu Baker put a finer point on why Congress needed to pass the amendment, asking, "What business is it of any State

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[44] Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, 58 U. MIAMI L. REV. 9, 9-10 & n.5 (2004).

[45] CONG. GLOBE, 39th Cong., 1st sess. 1088 (1866) (statement of Rep. John Bingham).

[46] CONG. GLOBE, 39th Cong., 1st sess. 2459 (1866) (statement of Rep. Thaddeus Stevens).

[47] CONG. GLOBE, 39th Cong., 1st sess. 2765 (1866) (statement of Sen. Jacob Howard).

[48] *Id.* at 2766.

to do things here forbidden [by the Bill of Rights]? [T]o rob the American citizen of rights thrown around him by the supreme law of the land?"[49] Baker went on: "When we remember to what an extent this has been done in the past, we can appreciate the need of putting a stop to it in the future."[50]

Representative Bingham eloquently summed up the State abuses that made the protections embodied in the Fourteenth Amendment necessary:

> The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws . . . . [T]he States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States . . . the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he

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[49] CONG. GLOBE, 39th Cong., 1st sess. app'x at 256 (1866) (statement of Rep. Jehu Baker).
[50] *Id.*

> had no remedy. They bought and sold men who had no remedy.[51]

Bingham concluded by explaining that the Constitution, with the ratification of the Fourteenth Amendment, now provided a remedy against such abuses:

> Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?[52]

In short, the Fourteenth Amendment's historical context shows that the Framers' "goals were sweeping and broad."[53] And, after much debate, the Thirty-Ninth Congress adopted the Fourteenth Amendment, reflecting discontent "with the protection individual liberties had received from the states" and "increased concern for the rights of blacks."[54] Congress wanted citizens, especially Black citizens, to be "shielded from hostile state action."[55] And to achieve these goals, Congress, by passing the Fourteenth Amendment, "significantly altered our system of government." *McDonald*, 561 U.S. at 807.

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[51] CONG. GLOBE, 42d Cong., 1st sess. app'x at 85 (1871). (statement of Rep. John Bingham).
[52] *Id.*
[53] Finkelman, *Historical Context*, *supra* note 10, at 409.
[54] CURTIS, *supra* note 25, at 91.
[55] *Id.*

II. THE FRAMERS WOULD HAVE INTENDED FOR THE EXCESSIVE FINES CLAUSE TO APPLY TO THE STATES.

With this history in mind, this Court should hold that the Fourteenth Amendment incorporates the Excessive Fines Clause. Because the Clause protects against abusive governmental practices of the kind commonly used to subjugate Black people in the post-Civil War period, the Framers would have intended its protections to apply against the States.

The Court has explained that the Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689." *United States v. Bajakajian*, 524 U.S. 321, 335 (1998) (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-267 (1989)). And the Excessive Fines Clause in the English Bill of Rights "was a reaction to the abuses of the King's judges during the reigns of the Stuarts." *Id.* The Founders included the Clause in the U.S. Constitution "as an admonition . . . against such violent proceedings, as had taken place in England," including "[e]normous fines and amercements [that] were . . . sometimes imposed."[56] Based on this history, this Court emphasized that the "*primary* focus of the [E]ighth] Amendment is [to protect against] the potential for governmental abuse of its prosecutorial power." *Browning-Ferris*, 492 U.S. at 266 (emphasis added).

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[56] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1896, at 750-51 (1833).

The goal of the Eighth Amendment was to protect against the Government unfairly wielding its power to punish citizens. This was also a key concern of the Fourteenth Amendment. The Framers were aware of the evils that attend the unchecked ability to mete out punishment, and therefore intended the Fourteenth Amendment to protect against it. The Framers no doubt would have wanted the Eighth Amendment's protection against excessive punishment—including excessive fines—to extend to the States. Consistent with what the Framers intended, the Court has said that the Fourteenth Amendment "makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433-34 (2001).[57]

The Framers made their intent of incorporating the entire Eighth Amendment clear when debating the reach of the Fourteenth Amendment. Throughout the debates, congressmen repeatedly highlighted the concern of States using exorbitant punishment to suppress Black people with no federal recourse. For example, as Representative Bingham said when closing debate on the Fourteenth Amendment: "cruel and unusual punishments have been inflicted under State laws within this Union upon citizens not only for crimes committed, but for sacred duty done, for which and against which the Government of the

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[57] The Indiana Supreme Court believed this was dictum. *See Indiana v. Timbs*, 84 N.E.3d 1179, 1182 (Ind. 2017), *cert. granted*, 138 S. Ct. 2650 (2018) (Mem.).

United States had no provided remedy and could provide none."[58]

The concerns of the Fourteenth Amendment's Framers about States meting out unjust punishment did not turn on what form the punishment took. In other words, the Framers did not exalt the Eighth Amendment's protection against "cruel and unusual punishments" over its protections against "excessive bail" or "excessive fines." *See* U.S. Const. amend. VIII. The Framers believed that *all* unjust punishment—especially punishment targeted at disenfranchising Black people—was abhorrent. Bingham did not mince words on this point, declaring "[i]t was an opprobrium to the Republic that for fidelity to the United States [that citizens] could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law."[59] The Fourteenth Amendment repaired this injustice by "strik[ing] down those State rights and invest[ing] all power in the General Government."[60]

The need for the Excessive Fines Clause to apply to the States is underscored by the fact that today, state and local governments increasingly use fines to punish crime.[61] The money from the fines is then used

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[58] CONG. GLOBE, 39th Cong., 1st sess. 2542 (1866) (statement of Rep. John Bingham) (internal quotation marks omitted).
[59] *Id.* at 2543.
[60] *Id.* at 2500 (statement of Rep. George Shanklin).
[61] *See* COUNCIL OF ECONOMIC ADVISERS ISSUE BRIEF, FINES, FEES, AND BAIL at 2-3 (Dec. 2015),

to fund local government.[62] As a result, the incentive to punish petty crime with excessive fines is greater than before.[63] And compounding the harm, state and local governments are disparately imposing these fines against Black Americans and other people of color.[64] This type of discriminatory punishment is the kind of wrong the Framers designed the Fourteenth Amendment to protect against.

Last fall, the U.S. Commission on Civil Rights issued a report entitled *Targeted Fines and Fees Against Communities of Color*.[65] One of the Report's key findings was that "unchecked discretion [and] stringent requirements to impose fines or fees can lead and have led to discrimination and inequitable access to justice when not exercised in accordance with protections afforded under [the Constitution]."[66]

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https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.

[62] CRIM. JUSTICE POLICY PROGRAM AT HARV. L. SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM at 1 (Sep. 2016), http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf.

[63] *Id.*

[64] *See, e.g.*, Michael Martinez, et al., *Policing for Profit: How Ferguson's Fines Violated Rights of African-Americans*, CNN (Mar. 6, 2015), https://www.cnn.com/2015/03/06/us/ferguson-missouri-racism-tickets-fines/index.html.

[65] U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS (Sept. 2017), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2017.pdf.

[66] *Id.* at 71.

The Report noted that since the 1980s, States and municipalities have increasingly used fines and fees as punishment for "low-level offenses" to "generate revenue."[67] The jurisdictions that use fines as a revenue source often "have a larger percentage of African Americans and Latinos relative to the demographics of the median municipality."[68] One article that the Report cited found that there was "one demographic that was most characteristic of cities that levy large amounts of fines on their citizens: a large African American population."[69]

The amount of criminal debt people face today is staggering—"some 10 million people owe more than $50 billion from contact with the criminal justice system."[70] Failure to pay this debt has debilitating

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[67] *Id.* at 7.

[68] *Id.* at 22. One study, after sampling "local governments in nine thousand cities," found that "fines and fees contribute to the revenue for roughly 86% of cities and are higher in locales with larger Black populations." Moreover, "[c]ities that have larger Black populations generate $12-$19 more in revenue from fees and fines per person, compared to those with smaller shares of Black citizens." Pamela Chan, et al., *Forced to Walk a Dangerous Line: The Causes and Consequences of Debt in Black Communities*, PROSPERITY NOW at 10 (March 2018), https://prosperitynow.org/sites/default/files/resources/Forced%20to%20Walk%20a%20Dangerous%20Line.pdf.

[69] Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2017), https://priceonomics.com/the-fining-of-black-america/.

[70] Katherine D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They Create*, HARV. KENNEDY SCH. & NAT'L INST. OF JUSTICE at 5 (Jan. 2017), https://www.ncjrs.gov/pdffiles1/nij/249976.pdf.

consequences,[71] including "driver license suspension, which presents a significant barrier to employment"; "bad credit reports that can keep a family from renting or purchasing a home"; "and in some cases, jail time."[72] And people who are jailed for criminal debt must face all the residual effects, including the trauma of being "locked in a cage"[73] "torn away from their communities and families"[74]; and the difficulty of "maintaining employment," making it harder (if not impossible) to survive financially once released.[75]

Simply, the need for the Eighth Amendment to protect citizens from excessive fines is as evident today as it was in 1868. In line with the intent of the Framers, the Court should hold that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause.

III. THE COURT SHOULD MORE CLOSELY ALIGN ITS PAST INCORPORATION CASES WITH THE HISTORY ANIMATING THE FOURTEENTH AMENDMENT.

The Court has recognized that there has been a shift in its incorporation jurisprudence. Particularly,

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[71] *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 290-95 (2014).

[72] U.S. COMM'N ON CIVIL RIGHTS, *supra* note 65, at 35-36.

[73] Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 257 (2013).

[74] Roopal Patel & Meghna Philip, *Criminal Justice Debt, A toolkit for Action*, BRENNAN CTR. FOR JUSTICE at 6 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf.

[75] *Id.*

the Court has "shed any reluctance to hold that rights guaranteed by the Bill of Rights me[e]t the requirements for protection under the Due Process Clause." *See McDonald*, 561 U.S. at 764-65. This brief offers a more uniform approach to incorporation, which would also open a door to reexamining prior decisions refusing to incorporate certain provisions of the Bill of Rights.

When appropriate, the Court should revisit its cases refusing to incorporate the Fifth Amendment's Grand Jury Clause and Seventh Amendment civil jury trial right. *See Hurtado*, 110 U.S. 516 (refusing to incorporate the Fifth Amendment's Grand Jury Clause); *Minneapolis & St. Louis R.R.*, 241 U.S. 211 (same for Seventh Amendment civil jury trial right). The Founders believed that both rights were critical guards against oppressive government power;[76] the Court should therefore reconsider whether they apply against the States.

Even more pressing, the Court should grant certiorari in an appropriate case to revisit its decision refusing to incorporate the Sixth Amendment's unanimous jury verdict right. *Apodaca*, 406 U.S. 404

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[76] *See Hurtado*, 110 U.S. at 549, 558 (Harlan, J., dissenting) (explaining that the Founders "jealously guarded" the grand jury right because it "secures [a defendant] against unfounded accusation"); *Parklane Hosiery v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting) ("The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.").

(plurality op.).[77] *Apodaca* is no longer compatible with this Court's case law, and it is sharply inconsistent with the incorporation framework proposed in this brief.

In *Apodaca*, "eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States." *McDonald*, 561 U.S. at 766 n.14. And this Court recently reiterated that the Sixth Amendment requires unanimity in federal criminal trials. *See Booker*, 543 U.S. at 230 ("It has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). Thus, if eight of the Justices in *Apodaca* agreed that the Sixth Amendment applies identically to both the Federal Government and the States, applying the Court's case law, unanimous jury verdicts should also be required in state criminal trials. *Apodaca* does not make sense considering this Court's established law.

The Court should also revisit *Apodaca* because it is inconsistent with the intent of the Framers, who were particularly concerned with state practices that subjugate African Americans. The *Apodaca* plurality was based on a misapprehension of the protections unanimity provides against racial and ethnic

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[77] *Apodaca* was decided the same day as *Johnson v. Louisiana*, 406 U.S. 356 (1972). *Johnson* held the Fourteenth Amendment did not itself require unanimity in state criminal trials.

prejudice infecting jury trials. Petitioners in *Apodaca* argued that unanimity protects against the silencing of minority jurors, and ensures convictions are based on evidence and not animus. *See Apodaca*, 406 U.S. at 412-13. The plurality rejected this argument because it "simply [found] no proof for the notion that a majority will disregard its instructions and cast its votes for guilt or innocence based on prejudice rather than the evidence." *Id.* at 413-14. Nor would the plurality "assume that the majority of the jury will refuse to weigh the evidence and reach a decision upon rational grounds . . . or that a majority will deprive a man of his liberty on the basis of prejudice when a minority is presenting a reasonable argument in favor of acquittal." *Id.*

But the history of Louisiana and Oregon's non-unanimity provisions reveals that the plurality was mistaken. Both states' provisions were enacted with discriminatory intent and were designed to facilitate convictions over the dissent of minority jurors.

Louisiana adopted its non-unanimity provision during the state's 1898 Constitutional Convention. As two scholars summarized: "the sinister purpose of the Convention was to create a racial architecture in Louisiana that could circumvent the Reconstruction Amendments and marginalize the political power of black citizens."[78] The Chair of the Convention's

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[78] Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 374-75 (2012).

Judiciary Committee, Judge Thomas Semmes, openly declared that the Convention's purpose was "to establish the supremacy of the white race."[79] "The Convention of 1898 interpreted its mandate from the [Louisiana] people to be, to disfranchise as many Negroes and as few whites as possible." *United States v. Louisiana*, 225 F. Supp. 353, 371 (E.D. La. 1963).

Contemporaneous accounts reveal the purpose of the non-unanimous jury provision adopted at the Convention was to silence the voices of Black jurors. The provision would also make it easier for juries to convict Black people. One local newspaper espoused that "[a]s a juror, [a Black person] will follow the lead of his white fellows in causes involving distinctive white interests; but if a negro be on trial for any crime, he becomes at once his earnest champion, and a hung jury is the usual result."[80] Another "commentator went so far as to claim that criminals would simply not be convicted because of the African-American presence in the jury box."[81] It was also widely believed that Black people were not of "much advantage in any capacity in the courts of law" because they were "ignorant, incapable of determining credibility, and susceptible to bribery."[82]

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[79] *Id.* at 375 (quoting *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana: Held in New Orleans, Tuesday, February 8, 1898*, at 374 (1898)).
[80] *Id.* at 375 (quoting *Future of the Freedman*, DAILY PICAYUNE, Aug. 31, 1873, at 5).
[81] *Id.* at 376 (citing *The Present Jury System*, DAILY PICAYUNE, Apr. 20, 1870, at 4).
[82] *Id.* at 375-76.

These were the sentiments that sparked Louisiana to adopt its non-unanimity provision.

The history of Oregon's non-unanimous jury provision is no better. In the late 1920s and early 1930s, Oregon was in a "deep [] recession and caught up in the growing menace of organized crime and the bigotry and fear of minority groups."[83] Oregon was a "society where racism, religious bigotry, and anti-immigrant sentiments were deeply entrenched in the laws, culture, and social life."[84]

Amid all this, there was a high-profile murder trial. Jacob Silverman, a Jewish man, was charged with shooting Jimmy Walker, a Protestant.[85] The jury convicted Silverman of manslaughter and hung on the murder charge 11-1 in favor of conviction.[86] Silverman was sentenced to three years in prison and fined $1000.[87]

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[83] Aliza B. Kaplan & Amy Saack, *Overturning* Apodaca v. Oregon *Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 4 (2016) (quotation marks omitted).

[84] *Id.* at 4 (quotation marks and brackets omitted). One stark example of Oregon's bigoted past: Black people were banned altogether from the state in the mid-1800s. *See* DeNeen L. Brown, *When Portland Banned Blacks: Oregon's Shameful History as an 'All-White' State*, WASH. POST (June 7, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/06/07/when-portland-banned-blacks-oregons-shameful-history-as-an-all-white-state/?utm_term=.a8d842e8ea01.

[85] Kaplan & Saack, *supra* note 83, at 3.

[86] *Id.* at 3-4.

[87] *Id.* at 5.

In response, the Oregon legislature "proposed a constitutional amendment allowing nonunanimous verdicts."[88] Articles in the local paper, *The Morning Oregonian*, highlighted the bigoted roots of the proposed amendment. One article specifically cited the Silverman case as coming "at exactly the right time to bring unprecedent pressure to bear upon the legislature."[89] Said another article, "Americans have learned, with some pain, that many peoples in the world are unfit for democratic institutions, lacking the traditions of the English-speaking peoples."[90] Yet another article lamented the "increased urbanization of American life" as "the vast immigration into America from southern and eastern Europe, of people untrained in the jury system, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory."[91]

Both Louisiana and Oregon's non-unanimous jury provisions were founded in bigotry. These provisions therefore perpetuate the very abuses the Fourteenth Amendment prohibits. And the Framers considered the jury trial right an important right that must be fully protected against state abuse. As Representative Bingham said: before the Fourteenth Amendment, States "denied trial by jury," but once it passed, the

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[88] *Id.* at 5.

[89] *Id.* (quoting *Jury Reform Up to Voters*, MORNING OREGONIAN (Dec. 11, 1933) (quotation marks omitted).

[90] *Id.* (quoting *Debauchery of Boston Juries*, MORNING OREGONIAN (Nov. 3, 1933) (quotation marks omitted).

[91] *Id.* (quoting *One Juror Against Eleven*, MORNING OREGONIAN (Nov. 25, 1933) (quotation marks omitted).

Constitution would "provide against all such abuses and denials of right."[92]

When presented with a case that raises the issue, the Court should revisit *Apodaca* and incorporate the Sixth Amendment's unanimity requirement.

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[92] CONG. GLOBE, 42d Cong., 1st sess. app'x. at 85 (1871) (statement of Rep. John Bingham).

CONCLUSION

150 years ago, when the Fourteenth Amendment was ratified, our Nation made its most significant step towards fulfilling the equality promised by the Declaration of Independence. The Fourteenth Amendment ensured that *all* citizens—Black and white—were guaranteed the rights embodied in the Constitution and provided protections should States try to deprive citizens of their rights. In accord with the Fourteenth Amendment's purpose and the intent of its Framers, the Court should hold that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause.

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September 11, 2018

No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a state law authorizing the forfeiture of a vehicle used on a regular basis to transport heroin, as part of the owner's narcotics trafficking activities, is forbidden by the Fourteenth Amendment to the United States Constitution.

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INTEREST OF THE AMICI CURIAE

Amici are not-for-profit organizations whose mission is to advance the interests of local governments and the public that is dependent on their services.[1]

The National Association of Counties (NACo) represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities is dedicated to helping city leaders build better communities. The League is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici, its members, or its counsel made a monetary contribution to its preparation or submission.

management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

STATEMENT OF THE CASE

In January 2013, petitioner Tyson Timbs bought a Land Rover LR2 from a dealer in Indianapolis for $42,058.30. Pet. App. 2. "Over the next four months, Timbs regularly drove the Land Rover between Marion and Richmond, Indiana, to buy and transport heroin." *Id.*

In May 2013, an undercover detective purchased heroin from Timbs on two occasions. Pet. App. 2, 14-15. A third undercover purchase was arranged, but on that day Timbs was apprehended during a traffic stop. *Id.* at 2. In June, Timbs was charged with two felony counts of dealing in a controlled substance and one count of felony conspiracy to commit theft. Pet. App. 3. On August 5, the State filed a complaint seeking forfeiture of the Land Rover, naming both Timbs and the vehicle as defendants. *Id.* at 27.

On April 12, 2015, Timbs pled guilty to one count of felony dealing and one count of conspiracy to commit theft, and was sentenced to six years imprisonment, with one year served in community corrections and five years suspended to probation, the payment of $385 in police costs, an interdiction fee of $200, $168 in court costs, a $50 bond fee, and

a fee of $400 for drug and alcohol assessment. Pet. App. 15.

On July 15, after a hearing in the forfeiture case, the trial court found that Timbs "drove the vehicle frequently from Marion to Richmond to purchase heroin" and "to transport heroin back to Marion," and that Timbs "both used and sold heroin." Pet. App. 28. Nevertheless, the court entered judgment in favor of Timbs, finding that forfeiture would violate the Eighth Amendment's prohibition on excessive fines. *Id.* at 29-30.

On appeal, a divided Indiana Court of Appeals affirmed, concluding that "[f]orfeiture of the Land Rover, which was worth approximately four times the maximum permissible statutory fine, was grossly disproportionate to the gravity of Timbs's offense." Pet. App. 24. The Indiana Supreme Court, however, reversed that judgment, holding that "[a]bsent a definitive holding from the Supreme Court, we decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." *Id.* at 9.

SUMMARY OF THE ARGUMENT

Timbs argues that the Eighth Amendment's prohibition on excessive fines is applicable to the States by virtue of the Fourteenth Amendment, which Timbs and some of his amici claim incorporates the first eight Amendments. In terms of the original meaning of the Fourteenth Amendment, this view is dubious. The historical evidence that the Fourteenth Amendment was originally understood to incorporate the first eight Amendments is deeply unsatisfactory. It provides no

basis for the Court to depart from its settled test for assessing claims of incorporation.

Under that test, the forfeiture at issue did not exceed constitutional bounds. Forfeiture of property used to facilitate a serious crime has never been regarded as constitutionally excessive, much less the type of affront to fundamental rights that runs afoul of the Fourteenth Amendment. Instead, forfeiture of this character advances legitimate governmental interests.

ARGUMENT

Under this Court's precedents, a right enumerated in the first eight Amendments to the Constitution is enforceable against the States if it is "incorporated in the concept of due process" because "the right in question is fundamental to *our* scheme of ordered liberty, or . . . is 'deeply rooted in this Nation's history and tradition,'" *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

Timbs and some of his amici, however, reject this test, and contend that the Fourteenth Amendment is properly understood to incorporate all rights enumerated in the first eight Amendments. *See* Pet. Br. 37-40; CAC Br. 14-20; NAACP Br. 12-16. This view was embraced by Justice Thomas in *McDonald*. *See* 561 U.S. at 838-50 (concurring in part and concurring in the judgment). We address that contention in Part I below. In Part II, we explain that forfeiture of Timbs's Land Rover offended neither the Eighth Amendment nor any fundamental right secured by the Fourteenth Amendment.

I. THE FOURTEENTH AMENDMENT DOES NOT INCORPORATE THE FIRST EIGHT AMENDMENTS.

Timbs argues that the Fourteenth Amendment incorporates "at minimum, the individual rights protected in the first eight Amendments." Pet. Br. 40.

In pertinent part, the Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend, XIV, § 1.

When interpreting constitutional text, this Court has written:

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) (brackets in original and citations omitted)). Thus, ascertaining the meaning of constitutional text requires "examination of a variety of legal and other sources to determine the *public understanding* . . . ." *Id.* at 605.

Focusing on the framing-era public's understanding of constitutional text is critical since it is, after all, the public, through its elected representatives, that ratifies text as part of the Constitution. Thus, as the author of the *Heller* opinion wrote: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." Antonin Scalia, *Common Law Courts in a Civil-Law System*, *in* A Matter of Interpretation: Federal Courts and the Law 3, 38 (Amy Gutmann ed., 1997).

Inquiry into the founding generation's understanding of the Fourteenth Amendment produces, at best, deeply mixed evidence. For that reason, the Court should reject Timbs's invitation to depart from its traditional approach to determine whether a given right is enforceable against the States under the Fourteenth Amendment.

A. The Evidence of the Original Meaning of the Fourteenth Amendment Is in Conflict.

The discussion that follows reviews the Fourteenth Amendment's original public meaning in terms of its text, drafting and ratification history, post-ratification history, judicial interpretations, and framing-era legal commentary. The evidence is, at best, in deep conflict.

1. Text – The Fourteenth Amendment's protection for "due process of law" is an odd textual formulation for rendering the rights in the first eight Amendments enforceable against the States. As Justice Frankfurter wrote: "It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and

inexplicit way." *Adamson v. California*, 332 U.S. 46, 63 (1948) (concurring opinion). Moreover, the Fifth Amendment also has a Due Process Clause, and "[i]t ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth." *Id.* at 66. In *McDonald*, Justice Thomas agreed, and instead focused on "what 'ordinary citizens' at the time of ratification would have understood the Privileges or Immunities Clause to mean." 561 U.S. at 811 (concurring in part and concurring in the judgment).

Protecting the "Privileges or Immunities of citizens of the United States," however, is also an odd way of making the first eight Amendments enforceable against the states. At the time the Fourteenth Amendment was crafted, citizens had no "Privileges or Immunities" enabling them to use the first eight Amendments to attack state laws. Instead, this Court had held that the first eight Amendments did not limit the authority of the States:

> The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states . . . . [T]he limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 247

(1833).

Barron produced the prevailing understanding of the "Privileges or Immunities" conferred by the first eight Amendments at the time of the Fourteenth Amendment's ratification. The leading framing-era treatises, for example, explained that *Barron* had settled that the first eight Amendments had no application to the States. *See, e.g.*, Thomas W. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 19 (1868) (Da Capo Press 1972); 1 James W. Kent, Commentaries on American Law 456 (O.W. Holmes rev. 1873).

Thus, when the Fourteenth Amendment was crafted, the privileges or immunities of citizenship included no privilege or immunity to attack state laws as inconsistent with the first eight Amendments. Indeed, not long after the Fourteenth Amendment's ratification, this Court took just this view in *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), holding that the Privileges or Immunities Clause prohibited state interference with only those rights that inhered in the citizen's relationship with the federal government, such as the rights to engage in interstate travel, to use navigable waters, to the protection of treaties, and to petition the federal government for redress of grievances. *Id.* at 96-111.

To be sure, some members of the Congress that drafted the Fourteenth Amendment entertained a different understanding. For example, Senator Jacob Howard, as he introduced what would become the Fourteenth Amendment on the floor of the Senate, stated that the privileges and immunities of citizens included "the personal rights guaranteed and

secured by the first eight amendments to the Constitution . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

Similarly, Rep. John Bingham, in debate over an earlier proposal that would have granted Congress "power to enact all laws which shall be necessary and proper to assure to the citizens of each State all privileges and immunities of citizens in the several States," CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866), stated that the proposal would permit enforcement of the first eight Amendments against the States. *See, e.g., id.* at 1034, 1088, 1089, 1090.[2]

While no other Member of Congress was quite that explicit, some stated that the proposal would facilitate enforcement of the existing provisions of the Constitution against the states.[3]

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[2] During the debate over the final version, Bingham was not as expansive, but mentioned in passing that the proposed amendment would authorize a remedy against "cruel and unusual punishments" in violation of the Eighth Amendment. *Id.* at 2542.

[3] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 586 (1866) (proposed amendment "provides in effect that Congress shall have power to enforce by appropriate legislation all the guarantees of the Constitution") (Rep. Donnelly), 1054 (proposal would "give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality") (Rep. Higby), 1057 (proposal protected rights "already to be found in the Constitution) (Rep. Kelley), 1066 (proposal would protect "freedom of speech from state suppression") (Rep. Price), 1088 (proposal protected "those privileges and immunities which are guaranteed . . . under the Constitution") (Rep. Woodbridge), 1263 (characterizing "the right of speech" "the writ of habeas corpus, and the right of petition" as "the rights and immunities of citizens") (Rep. Broomall), 1294 (referring to proposal as a "bill of rights") (Rep. Wilson), 2459 (proposal's protections "all are asserted, in some

Given *Barron*, it is fair to ask how Bingham, Howard, and others could have thought that the "privileges or immunities" formulation could have secured the first eight Amendments against the States. The answer, it turns out, is that they had an unconventional view of the privileges and immunities of citizenship. There was a school of thought that understood *Barron* to mean only that the federal government lacked power to enforce the first eight Amendments against the States, while still believing that they nevertheless limited the power of the States. In the debate over the admission of Oregon to the Union, for example, Bingham denied "that the States are not limited by the Constitution of the United States, in respect of the personal or political rights of citizens of the United States," adding that "whenever the Constitution guarantees its citizens a right, either natural or conventional, such guarantee is itself a limitation upon the States." CONG. GLOBE, 35th Cong., 2d Sess. 982 (1859).

As incorporation advocate Michael Kent Curtis has demonstrated, Bingham was part of a school that believed that the first eight Amendments applied to the States even prior to the Fourteenth Amendment. *See* Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 37-41, 49-54, 59-91, 112 (1986) [hereinafter "No State Shall Abridge"]. *Accord, e.g.*, Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 181-87 (1998). Professor Curtis acknowledged, however, that this view did not

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form or another, in our . . . organic law") (Rep. Stevens), 2961 (proposal would enable enforcement of "all the provisions of the Constitution") (Sen. Poland) (1866).

represent an accurate account of the existing privileges and immunities of citizenship: "[S]uch claims were made even though the Supreme Court had ruled in 1833 [in *Barron*] that the guarantees of the federal Bill of Rights did not impose limits on the states." Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges and Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1010-11 (2000) (footnote omitted) [hereinafter Curtis, *Inkblots*]. *Accord, e.g.*, Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L.J. 1509, 1543 (2007) ("the *Barron* contrarian view was and remains unorthodox and incorrect").

Thus, the views of these "*Barron* contrarians" are not likely an accurate gauge of how most would have understood the "privileges or immunities" of national citizenship in the framing era.

To be sure, as Justice Thomas observed in *McDonald*: "At the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.'" 561 U.S. at 813. *Accord, e.g.*, Curtis, *Inkblots*, *supra* at 1094-1136. Under *Barron*, however, citizens had no right to attack state laws as inconsistent with the first eight Amendments. While the Fourteenth Amendment secured the privileges and immunities of national citizenship as rights against the States, those privileges and immunities did not include a right to use the first eight Amendments against the States. Thus, it is far from clear that the public would have understood the Fourteenth Amendment to embrace an unorthodox and incorrect account of the privileges and immunities of citizenship.

Indeed, constitutional text addressed to the privileges and immunities of citizenship was not new; the original Constitution provided that the citizens of each state were entitled to "all privileges and immunities of citizens of the several states," U.S. Const. art. IV, § 2, cl. 1.[4] The leading treatises of the era explained that this Article IV Privileges and Immunities Clause prohibited States from discriminating against citizens of other States with respect to state and common-law rights thought to be fundamental, without any reference to the first eight Amendments. *See* Cooley, *supra*, at 15-16; 2 Kent, *supra*, at 84-85; George W. Paschal, The Constitution of the United States: Defined and Carefully Annotated 226 (1868); 2 Joseph Story, Commentaries on the Constitution of the United States § 1806 at 582 & n.4 (1832) (Melville M. Bigelow rev. 1891). And, only months after the ratification of the Fourteenth Amendment, *see* Proclamation No. 13, 15 Stat. 708, 710 (July 28, 1868), this Court construed the Article IV Clause as a nondiscrimination obligation with respect to state-law rights. *See Paul v. Virginia*, 75 U.S. (6 Wall.) 168, 179-83 (1868).

Accordingly, some eminent scholars have argued that the Fourteenth Amendment's Privileges or Immunities Clause was understood to merely extend the nondiscrimination obligation of Article IV by prohibiting States from discriminating against

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[4] This formulation was close enough to the Fourteenth Amendment's that both Bingham and Howard referenced the Article IV provision as providing insight into the current proposal. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1089, 2542 (1866) (Rep. Bingham); *id.* at 2765 (Sen. Howard) (1866). To similar effect, *see id.* at 1054 (Rep. Higby), 1057 (Rep. Kelley).

classes of their own citizens with respect to state-law rights considered fundamental, with the Equal Protection Clause affording a right to nondiscriminatory protection from private lawbreakers. *See, e.g.*, David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 342-51 (1985); John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 Yale L.J. 1385, 1397-432 (1992).

Considering this welter of conflicting evidence, it should be unsurprising that after Sen. Howard's speech, other senators denied that there was any settled meaning of "privileges or immunities." *See* CONG. GLOBE, 39th Cong., 1st Sess. 3039 (1866) (Sen. Hendricks), 3041 (Sen. Johnson). In the House, similarly, Rep. Boyer argued that section one was "open to ambiguity and admitting of conflicting constructions." *Id.* at 2467.

Thus, it is far from clear that the public understood that the original meaning of the Fourteenth Amendment's text made the first eight Amendments applicable to the States.

2. Drafting History – As we explain above, some members of the Congress that drafted the Fourteenth Amendment expressed an incorporationist understanding of its text. Others, however, understood it as an antidiscrimination provision, a view supported by the prevailing understanding of the Article IV Privileges and Immunities Clause.

During the debate on Bingham's original proposal, for example, Thaddeus Stevens stated that the proposal "provide[d] that, where any State makes a distinction in the law between different

classes of individuals, Congress shall have the power to correct such discrimination and inequality . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866). With respect to the final version, Stevens observed: "This amendment . . . allows Congress to correct the unjust legislation of the states, so far that the law which operates upon one man shall operate equally upon all." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).[5]

Similarly, Senator Luke Poland thought that the proposed Amendment "secures nothing beyond what was intended" by Article IV's Privileges and Immunities Clause, CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866). Senator Garrett Davis likewise referred to the Privileges or Immunities Clause as tracking its Article IV analogue. *Id.* at App. 240.

References to antidiscrimination as the meaning of the Fourteenth Amendment were hardly isolated. The single most frequently expressed understanding of the proposed amendment was that it constitutionalized the Civil Rights Act of 1866.[6] The Civil Rights Act, however, was an antidiscrimination provision that did not purport to

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[5] For a useful discussion of the dynamics of the drafting process and Stevens' important role, see Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863-1869, at 79-92 (1990).

[6] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866) (Rep. Garfield); *id.* at 2465 (Rep. Thayer); *id.* at 2467 (Rep. Boyer); *id.* at 2468 (Rep. Kelley); *id.* at 2498 (Rep. Broomall); *id.* at 2501 (Rep. Raymond); *id.* at 2501 (Rep. Raymond); *id.* at 2509 (Rep. Spaulding), *id.* at 2511 (Rep. Eliot); *id.* at 2534 (Rep. Eckley); *id.* at 2538 (Rep. Rogers); *id.* at 2539 (Rep. Farnsworth); *id.* at 2549 (Rep. Stevens); *id.* at 2883 (Rep. Latham); *id.* at 2961 (Sen. Poland); *id.* at 3031 (Sen. Henderson); *id.* at 3069 (Rep. Van Aernam).

render the first eight Amendments applicable to the States. *See* Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866). Indeed, "[t]he legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Georgia v. Rachel*, 384 U.S. 780, 791 (1965). On incorporation, the evidence from the congressional debates is, at best, in conflict.

3. Ratification – If Congress had conveyed to the public that the proposed Fourteenth Amendment repudiated the conception of the privileges and immunities of citizenship found in *Barron* and Article IV, one would expect an indication to that effect in the ratification debates in the States. There is, however, little evidence along these lines.

The threshold problem is that the evidence of the ratifiers' understanding is itself unsatisfactory. As Professor Curtis explained, "[m]ost of the state legislatures that considered the Fourteenth Amendment either kept no record of their debates, or their discussion was so perfunctory that it sheds little light on their understanding of its meaning. Messages by governors are available, but most are quite general . . . ." Curtis, No State Shall Abridge, *supra* at 145.[7] Another incorporation advocate,

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[7] To similar effect, see James E. Bond, No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment 8-9 (1997). For a summary of the rather generic discussions during ratification, see Curtis, *supra*, at 131-54. Even Bingham spoke in generic platitudes during ratification, leading one historian to speculate that the framers were on the defensive during the ratification process and limited their claims about the impact of the proposed

Bryan Wildenthal, admitted that "the evidence from the ratification process seems vague and scattered when it comes to any strong public awareness of nationalizing the entire Bill of Rights." Wildenthal, *supra*, at 1601.

Likely the most thorough study is James Bond's analysis of the debates surrounding ratification in Illinois, Ohio, and Pennsylvania, where the weight of the evidence indicates that proposed amendment was understood to embody the Civil Rights Act, with virtually no discussion of the effect of the Fourteenth Amendment on the first eight Amendments. *See* James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 445-54 (1985). His study of the ratification debate in the former confederate states similarly found little evidence of an incorporationist understanding, although he unearthed considerable evidence that the amendment was understood as an antidiscrimination rule.[8]

To be sure, as Justice Thomas observed, much of Sen. Howard's key speech was reprinted in major newspapers. *See McDonald*, 561 U.S. at 832-33. Critically, however, none of these accounts made any special mention of incorporation of the first eight Amendments. *See, e.g.*, Wildenthal, *supra*, at

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amendment. *See* Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 173-75 (2000).

[8] *See* Bond, *supra* note 7, at 10, 19-24, 45, 56-58, 80-81, 86-90, 103-07, 111. 123-24, 127-28, 148-50, 173-77, 180-82, 199, 215-17, 220-23, 234-38, 241-42, 252-55. See also James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 Wake Forest L. Rev. 89, 112-16 (1984).

1564. And, as Professor Wildenthal acknowledged, although the *New York Times* gave "prominent front-page coverage to Congress's final passage and submission of the Amendment to the States . . . there was no mention of incorporation." *Id.* at 1595. George Thomas's survey demonstrated that there were, at most, a tiny handful of newspaper articles that could have drawn the public's attention to a potential for incorporation. *See* George C. Thomas, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. Contemp. Leg. Issues 323, 347-59 (2009).

At best, some incorporation advocates have pointed to evidence that during congressional campaign of 1866, some advocates called for ratification of the Fourteenth Amendment to protect the constitutional rights of citizens against the States. *See* Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship 204-21 (2014); Curtis, *Inkblots*, *supra*, at 1134-36. Such appeals, however, could have been understood in terms of securing the constitutional right to be free from discrimination with respect to fundamental rights. In any event, the lack of evidence that the Fourteenth Amendment was understood to incorporate the first eight Amendments in the ensuing ratification debates in the States leaves the matter in considerable doubt.

4. Post-Ratification History – If the public had understood that the Fourteenth Amendment placed the States under an obligation to bring their laws into conformity with the first eight Amendments, one might expect some movement along those lines in the wake of ratification. Yet, nothing like that

happened.

As Professor Fairman's comprehensive survey demonstrated, at the time of ratification, there were numerous inconsistencies between the laws of the ratifying states – even outside the South – and the first eight Amendments, and ratification produced no movement to bring those laws into conformity with the first eight Amendments. *See* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5, 84-123 (1949). There were similar flaws in the constitutions of the many of the southern states later readmitted to Congress, even though Congress approved each readmitted state's constitution and required each to be in conformity with the United States Constitution, including the new Fourteenth Amendment. *See id.* at 126-32 (observing that in 1868, Congress approved the admission of Florida, South Carolina, Louisiana, and in 1870, Congress approved admission of Virginia and Texas, despite their constitutions' inconsistency with the Fifth Amendment's Grand Jury Clause, and in 1868, Congress approved admission of Georgia despite its constitution's limitations on jury rights under the Sixth and Seventh Amendments).

Moreover, the Fourteenth Amendment's ratification did nothing to halt the reform movement that, advancing the view that the grand jury was an undesirable anachronism, led a number of States, in the wake of the Fourteenth Amendment's ratification, to nevertheless permit prosecution by information, despite the Fifth Amendment's Grand Jury Clause. *See* Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First)*

Criminal Procedure Revolution, 18 J. Contemp. Leg. Issues 469, 478-90 (2009). Indeed, in the wake of ratification, five states modified their grand jury requirements in ways inconsistent with the Fifth Amendment's Grand Jury Clause. *See* George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 Ohio St. L.J. 1627, 1654-55 (2007). This is not what one would expect had there been a general understanding that upon the Fourteenth Amendment's ratification, the first eight Amendments had become binding on the states.

5. Judicial Interpretations in the Wake of Ratification – If an incorportionist understanding of the privileges and immunities of citizenship inconsistent with the antebellum regime of *Barron* had emerged in the process of framing and ratifying the Fourteenth Amendment, one might expect to some evidence of that understanding in the judicial decisions that followed ratification. The evidence of such an understanding, however, is quite thin.

Months after ratification of the Fourteenth Amendment, this Court unanimously rejected a claim that a state indictment was inconsistent with the Fifth and Sixth Amendments, citing *Barron* and its progeny as controlling. *See Twitchell v. Pennsylvania*. 74 U.S. (7 Wall.) 321, 325-26 (1868). Akhil Amar, a leading incorporationist, attributes this to Twitchell's counsel, who made no argument based on the newly-minted Fourteenth Amendment. *See* Amar, *supra*, at 206-07. Still, if the process of ratification had produced a widespread understanding that the Fourteenth Amendment had overturned *Barron*, one might expect the Court to at least note

that much, and rest its decision on Twitchell's failure to press the point.[9]

The Court's first explicit discussion of the meaning of the Fourteenth Amendment's Privileges or Immunities Clause came *Slaughter-House*, in which, as we explain above, the Court described the privileges and immunities of citizenship in terms of the rights citizens held with respect to the federal government. *Slaughter-House* provides a good indication that it was, at best, unclear in the framing era that the Privileges or Immunities Clause was understood in incorporationist terms.[10]

Incorporation was squarely at issue in *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532 (1874), in which the Court considered an argument that a state statute abridged a privilege and immunity of citizenship by denying the Seventh Amendment's right to trial by jury in civil cases. *Id.* at 544. Without dissent, and citing *Barron*, the Court wrote that the Seventh

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[9] Similarly, in *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 169 (1871), the Court again acted as if *Barron* remained good law, rejecting an effort to apply the Fifth Amendment's prohibition on uncompensated taking of private property on the ground that "though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States." *Id.* at 176-77.

[10] In dissent, Justice Bradley, joined by Justice Swayne, understood the privileges and immunities of citizenship to include all fundamental rights, including those in the first eight Amendments, 83 U.S. (16 Wall.) at 112-19, but Justice Field's dissent characterized the new Privileges or Immunities clause as a nondiscrimination obligation, *id.* at 96-101. Thus, only two Justices understood the Privileges or Immunities Clause to accomplish incorporation.

Amendment "does not apply to trials in the State courts." *Id.* at 557 (footnote omitted).

United States v. Cruikshank, 92 U.S. (2 Otto) 542 (1875), involved the sufficiency of an indictment brought under the Enforcement Act of 1870, which prohibited conspiracies to "hinder . . . free exercise of any right or privilege . . . secured by the constitution or laws of the United States. *Id.* at 548 (quoting Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 141 (1870)). The Court rejected counts alleging that the defendants deprived the victims of their First Amendment rights, citing, among other cases, *Barron*, *Twitchell*, and *Edwards*, *id.* at 552, and followed *Slaughter-House* in treating as protected only "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the power or duties of the national government . . . ." *Id. Cruikshank*, moreover, called non-discrimination the animating principle of the Fourteenth Amendment: "The equality of the rights of citizens is a principle of republicanism . . . . The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more." *Id.* at 555.

The following year, the Court again rejected, unanimously, application of the Seventh Amendment to the states. *See Walker v. Sauvinet*, 92 U.S. (2 Otto) 90, 92-93 (1875).

In sum, "[i]f there had been a public understanding that the Fourteenth Amendment had accomplished incorporation, it is surely strange that the Supreme Court's framing-era opinions contain so little evidence of that understanding." Lawrence

Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. Contemp. Leg. Issues 361, 394 (2009).[11]

6. Framing-Era Commentary – A review of the leading scholarly commentaries of the framing era provides, at best, conflicting evidence that the original meaning of the Fourteenth Amendment was incorporationist.

Perhaps the leading scholarly work on constitutional law of the framing era was Thomas Cooley's treatise, which this Court, in *Heller*, characterized as "massively popular." 554 U.S. at 616. The first edition of the treatise to appear after ratification stated that it was "doubtful" whether the Privileges or Immunities Clause "surround the citizen with any protections additional to those before possessed under the State Constitutions . . . but a principle of State constitutional law has now been made part of the Constitution of the United States." Thomas Cooley, A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States *294 (2d ed. 1871). This statement, while no model of clarity, suggests that the Fourteenth Amendment merely forbade states from discriminating with respect to rights protected by state law.

In any event, Cooley was quite clear in his 1873

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[11] There was a published framing-era lower court decision that embraced incorporation, *see United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15,282), but two other decisions published at about the same time rejected incorporation. *See United States v. Crosby*, 25 F. Cas. 701, 704 (C.C.C.S.C. Ala. 1871) (No. 14,893); *Rowan v. State*, 30 Wis. 129, 148-50 (1872).

revision of Justice Story's treatise on constitutional law. The revision unambiguously defined the Privileges or Immunities Clause as an antidiscrimination provision. *See* 2 Joseph Story, Commentaries on the Constitution of the United States §§ 1934-37 (4th ed. Thomas L. Cooley rev. 1873). The next year, Cooley published a new edition of his own treatise, and cited the previous year's revision of Story on the character of the Fourteenth Amendment's Privileges or Immunities Clause. *See* Thomas Cooley, A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States * 12, *573 n.3 (3d ed. 1874).

The question of incorporation was also addressed in the June 18, 1874 issue of the *Central Law Journal*, which, citing *Barron*, stated that the Second Amendment had no application to the states. *See The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 Cent. L. J. 295 (John F. Dillon ed., 1874). The *Review* was edited by John Forrest Dillon, "one of the most accomplished legal figures in America." Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 Stan. L. & Pol'y Rev. 571, 593 (2006).

Similarly, new editions of the leading criminal law treatises of the day appeared in the wake of the Fourteenth Amendment, written by Joel Prentiss Bishop and Francis Wharton, and both failed to discern any applicability of the first eight Amendments to the states, describing these Amendments as restrictions on only the federal government. *See* 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure §§

99, 145, 891-92, 946, 981 (5th ed. 1872); 1 Francis Wharton, A Treatise on the Criminal Law of the United States: Principles, Pleading and Evidence §§ 213, 573 (7th ed. 1874); 3 *id.* § 3405.

To be sure, the evidence is mixed. For example, Timothy Farrar, in the third edition of his treatise, published in 1872, after noting *Barron* and it progeny, added, without elaboration, that these precedents "are entirely swept away by the 14th Amendment." Timothy Farrar, Manual of the Constitution of the United States 546 (3d ed. 1872). Farrar, however, is something of an unreliable narrator. In his first edition, Farrar claimed that under the antebellum Constitution, the Bill of Rights applied to the States, *See* Timothy Farrar, Manual of the Constitution of the United States 58-59, 395-97 (1867). As we explain above, this view that was quite wrong as a matter of contemporary public meaning.[12]

John Norton Pomeroy's 1868 treatise, written when the proposed Fourteenth Amendment was before the States, acknowledged that the States

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[12] In his 1868 treatise, George Paschal wrote that the rights secured by the Fourteenth Amendment "ha[ve] already been guarantied in the second and fourth sections of the fourth article, and in the thirteen amendments. The new feature is that the general principles . . . are thus imposed on the States." Paschal, *supra*, at 290. Paschal, however is also something of an unreliable source; his scholarship was sloppy. No one involved in framing or ratification thought that the Fourteenth Amendment incorporated the Ninth, Tenth, Eleventh, or Twelfth Amendments; the Tenth and Eleventh Amendments expressly limit federal and not state power, and the Twelfth Amendment involves only the manner by which the President and Vice-President are elected. *See* U.S. Const. amend. IX-XII.

were not bound by the first eight Amendments yet vigorously criticized that state of affairs. *See* John Norton Pomeroy, An Introduction to the Constitutional Law of the United States §§ 232-36 (1868). Pomeroy then added:

> [A] remedy is easy, and the question of its adoption is before the people . . . . When the Constitution has from the beginning contained prohibitions upon the power of the states to pass bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, it is strange that a provision forbidding acts which deprive a person of life, liberty, or property, without due process of law, was not also inserted at the outset; it is more than strange that any objections can be urged against the proposal now to remedy the defect.

Id. at § 237 at 151. It is unclear whether Pomeroy's "remedy" is incorporation or merely extending the guarantee of due process to the states. Moreover, Pomeroy's 1875 edition described constitutionally protected "privileges or immunities" without reference to the first eight Amendments:

> All the rights which inhere in national citizenship as such, are fully protected against hostile state legislation. The negative clauses of the XIVth Amendment, executing themselves in the same manner as the clauses forbidding *ex post facto* laws and the like, invalidate every state statute which is opposed to their inhibitions. The rights thus protected are all civil in their nature, and not political, and embrace the fundamental capacities and right to pass through the States at will, to enter and dwell in

> any one at will, to acquire, hold, and transmit personal and real property, to enter into contracts, to engage in and pursue all lawful trades and avocations, to obtain redress in the courts, and to be equal before the laws. Such civil rights make up the privileges and immunities of citizens of the United States.

John Norton Pomeroy, An Introduction to the Constitutional Law of the United States § 767, at 532 (3d ed. 1875).[13]

At best, the evidence from the commentators is deeply mixed. If the process of framing and ratification had informed the public that the first eight Amendments were to bind the states, it is surely odd that leading figures such as Cooley, Dillon, Bishop and Wharton missed the news.

B. This Court Should Not Depart from Its Incorporation Precedents

As we explain above, this Court has rejected incorporation of the first eight Amendments within the Fourteenth. It has instead asked whether a right is "fundamental to *our* scheme of ordered liberty, or . . . whether it "is 'deeply rooted in this Nation's history and tradition,'" *McDonald*, 561 U.S. at 767 (quoting *Glucksberg*, 521 U.S. at 721).

This Court should not depart from its precedents lightly. After all, "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal

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[13] One might think that Pomeroy's third edition had been influenced by *Slaughter-House*, but his third edition expresaly states that *Slaughter-House* "can hardly be regarded as final in giving a construction of the XIVth Amendment." *Id.* at 530.

principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2008) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). When determining whether to repudiate precedent, this Court considers "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478-79.

As we explain above, the evidence that this Court's precedents have misapprehended the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause is, at best, mixed. Certainly, the evidence does not demonstrate with unmistakable clarity that the Court has erred.

Petitioners and their amici make no argument that the Court's approach to incorporation has also proven unworkable. Nor do petitioners or their amici make any claim that the Court's incorporation precedents are inconsistent with a line of related decisions, or with developments since those precedents were handed down.

Reliance interests, in contrast, counsel strongly against a change of course. For example, more than a century ago, the Court held that the Fifth Amendment's Grand Jury Clause does not apply to the States, and that due process permits States to utilize preliminary hearings at which judges determine whether charges are supported by probable cause. *See Hurtado v. California*, 110 U.S. 516 (1884). Since then, the Court has never repudiated *Hurtado*. *See McDonald*, 561 U.S. at 765

n.13. In reliance on *Hurtado*, 28 States permit felony charges to be brought by information rather than grand jury indictment, and in those States, the vast majority of cases proceed by information. *See* 4 Wayne R. LaFave et al., Criminal Procedure § 15.1(g) (4th ed. 2017).

States have reason to prefer charging by information, with judicial review of charging undertaken at preliminary hearings, to grand-jury indictment. Many criticize the use of grand juries, for example, believing that they are offer little effective check on prosecutorial power. *See id.* § 15.3(a). Even prosecutors have reason prefer charging by information; as one commentator observed: "Even in jurisdictions where grand juries rarely decline to indict, the grand jury requirement still imposes meaningful costs on the prosecutor's office, including the costs related to prosecutor time and grand jury time." Paul T. Crane, *Charging on the Margin*, 57 Wm. & Mary L. Rev. 775, 803 (2016). Incorporating the first eight Amendments against the States would therefore impose substantial costs on states that have developing charging systems in justifiable reliance on *Hurtado*.

Similarly, in reliance on the decisions we discuss above refusing to incorporate the Seventh Amendment civil-jury right against the States, a majority of States narrower right to a civil jury trial than is reflected in this Court's Seventh Amendment jurisprudence. *See, e.g.*, Eric J. Hamilton, Note, *Federalism and State Civil Jury Rights*, 65 Stan. L. Rev. 861 (2013) (discussing approaches to civil jury rights in cases involving intertwined issues). This area of state law would also be disrupted by a regime of total incorporation.

Accordingly, a holding that would compel states to adhere to the first eight Amendments would impose substantial burdens on the States that developed approaches to charging in reasonable reliance on this Court's incorporation precedents. That is reason enough to reject petitioners' argument for total incorporation.

II. FORFEITURE OF TIMBS'S VEHICLE DOES NOT VIOLATE THE CONSTITUTION.

Petitioners attack is framed at a high level of generality; they argue that "the right to be free from excessive fines remains 'fundamental to our scheme of ordered liberty' today." Pet. Br. 35 (quoting *McDonald*, 561 U.S. at 767). Petitioners and their amici, however, have little to say about whether the forfeiture sought in this case offends any fundamental right.

To be sure, in the decision below, the Indiana Supreme Court "decline[d] to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." Pet. App. 9. To the extent that this passage suggests that the court believed the United States Constitution places no limitations on the power of States to impose fines, it may well be overbroad. "This Court, however, reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 293, 297 (1956). There is nothing about the forfeiture sought in this case that offends a fundamental right incorporated within the Fourteenth Amendment, or even this Court's Eighth Amendment jurisprudence.

As this Court has observed: "[A] long and

unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put . . . ." *Bennis v. Michigan*, 516 U.S. 442, 446 (1996). *Accord, e.g., United States v. Bajakajian*, 524 U.S. 321, 333 (1998) ("Instrumentalities historically have been treated as a form of 'guilty property' that can be forfeited in civil *in rem* proceedings."); *Bennis*, 516 U.S. at 454 (Thomas, J., concurring) ("[F]orfeiture of property . . . because it was 'used' in or was an 'instrumentality' of crime has been permitted in England and this country, both before and after the adoption of the Fifth and Fourteenth Amendments.").

Moreover, forfeiture of property used by its owner to facilitate unlawful activity advances legitimate governmental interests "both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Bennis*, 516 U.S. at 452 (citation and internal quotations omitted).

The forfeiture sought here fits squarely within this tradition. Indiana law permits the state to forfeit vehicles that are used to transport narcotics if the owner knew or had reason to know that the vehicle was being used unlawfully. Ind. Code §§ 34-24-1-1(a)(1) & 34-24-1-4(a). Under Indiana law, the forfeiture of property utilized to commit a crime is considered a civil action with both punitive and remedial justifications:

> [W]hile punishing and deterring those who have engaged in illegal drug activity, forfeiture simultaneously advances other non-punitive, remedial legislative goals. First, forfeiture creates an economic disincentive to engage in

> future illegal acts. It also serves another significant, albeit secondary, purpose. Forfeiture advances our Legislature's intent to minimize taxation by permitting law enforcement agencies, via the sale of property seized, to defray some of the expense incurred in the battle against drug dealing. It is these broad remedial characteristics which support our Court of Appeals' determination that forfeiture actions are civil in nature.

Katner v. State, 655 N.E.2d 345, 347-48 (Ind. 1995) (citations omitted).

The constitutional authority of states to enforce fines and forfeitures is not without limits. For example, the Fourteenth Amendment's Due Process Clause may well require the judiciary to "police exorbitant applications of the statute," *Bennis*, 516 U.S. at 457 (Ginsburg, J., concurring). The Amendment's Due Process and Equal Protection Clauses, moreover, prohibit incarcerating an individual who is unable to pay a fine. *See Bearden v. Georgia*, 461 U.S. 660, 666-73 (1981). Timbs, however, makes no claim of any extraordinary hardship stemming from the forfeiture sought here.

When it comes to forfeiture under federal law, forfeiture "is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Austin v. United States*, 509 U.S. 602, 622 (1993) (citation and internal quotation omitted). *Austin*'s holding that forfeiture is a "fine" within the meaning of the Eighth Amendment, however, does not mean that forfeiture of a vehicle used by its owner on a regular basis to transport heroin is "excessive" within the meaning of the Eighth Amendment, much less an

infringement of a fundamental right incorporated within the Fourteenth Amendment. Even putting aside the Indiana Supreme Court's expressed willingness to set aside excessive forfeitures as a matter of state constitutional law, the forfeiture sought here is appropriately proportioned, regardless whether Eighth or Fourteenth Amendment standards are applied. Three considerations are critical.

First, forfeiture deprives Timbs of property integral to his unlawful conduct. The Land Rover was hardly peripheral to Timbs's narcotics trafficking; the trial court found that Timbs used it on regular a basis to transport heroin. Timbs does not question the sufficiency of the evidence supporting that finding.

Second, by depriving Timbs of his investment in the Land Rover, forfeiture achieves rough proportionality. It is, of course, difficult for the prosecution to determine the revenues derived from crimes that involve covert economic activities such drug trafficking. The trial court found that Timbs had trafficked heroin on a regular basis, but his unlawful revenues could not be ascertained more precisely. It is, of course, often easy for narcotics traffickers to conceal the proceeds of their unlawful activities. Accordingly, depriving Timbs of his investment in the property that he used to carry out those activities is likely the best the legislature can do to devise a proportioned financial penalty. *Cf. Bajakajian*, 524 U.S. at 336 (rejecting an Eighth Amendment test "requiring strict proportionality between the value of a forfeiture and the gravity of a criminal offense" and instead "adopt[ing] the standard of gross disproportionality").

Third, and perhaps most important, the Land Rover was used to commit a serious offense. States are surely entitled to take heroin trafficking quite seriously. As one assessment recently concluded:

> Heroin-related deaths will continue at high levels in the near term. The heroin available in white powder markets in the United States is very high-purity. Increasing poppy cultivation in Mexico, the primary supplier of U.S. heroin markets, ensures it will remain high-purity. The heroin market is further intertwined with the fentanyl market, with heroin supplies in white powder markets increasingly laced with highly-potent fentanyl. This combination will most likely lead to an increase in opioid deaths in the near term.

DEA, U.S. Dep't of Justice, 2017 National Drug Threat Assessment 55 (Oct. 2017). Those who traffic highly addictive and dangerous substances pose a profound threat to public health and welfare. In additional to imprisonment, the legislature is surely entitled to impose substantial financial penalties, especially when many jurisdictions may lack the financial ability to imprison all engaged in drug trafficking for substantial periods of time.

This forfeiture stands in sharp contrast to *Bajakajian*, the only case in which this Court has found a forfeiture to violate the Eighth Amendment. In that case, the government sought a forfeiture of $357,144 in cash seized from an offender guilty of a "failure to report the removal of currency from the United States," an offense that was "unrelated to any other criminal activities," reflecting what the Court characterized as a "minimal level of

culpability," and in which "[t]he harm . . . caused was also minimal." 524 U.S. at 337, 338.

It would be absurd to compare the technical violation in *Bajakajian* with Timbs's adventures in heroin trafficking. *Cf. Harmelin v. Michigan*, 501 U.S. 957, 1001-05 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (upholding mandatory life sentence for possessing more than 650 grams of cocaine against the claim that it constituted cruel and unusual punishment). This is not a case in which forfeiture works an undue hardship on one guilty of a technical, regulatory offense.

To support their conclusion, the only consideration invoked by the trial court and a divided Indiana Court of Appeals was that the value of the forfeiture exceeds the maximum statutory fine of $10,000. *See* Pet. App. 20-22, 29-30. The maximum fine, however, is in generic statute that provides for a maximum fine for every felony. See Ind. Code §§ 35-50-2-4 to -7. Surely the legislature was entitled to impose an additional financial penalty in cases involving special threats to public health, and to utilize the remedy of forfeiture for property already in the State's custody. Forfeiture, of course, avoids the difficulties in collecting fines from defendants whose assets will frequently be difficult to discover, or who may be unable to pay. *Cf.* ACLU Br. 12-21 (explaining that fines are frequently imposed on impoverished individuals with limited ability to pay).

Accordingly, even if the Eighth Amendment were directly applicable to this state-law forfeiture, nothing about the forfeiture at issue is

constitutionally excessive. For the same reason, it offends no deeply rooted, fundamental right protected by the Fourteenth Amendment.

CONCLUSION

For the preceding reasons, the judgment of the Supreme Court of Indiana should be affirmed.

Respectfully Submitted,

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No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct in both state and federal court. NACDL was founded in 1958, and has a nationwide membership of many thousands of direct members, and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. It is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL submits this brief both to voice its agreement with Petitioner that the Excessive Fines Clause of the Eighth Amendment applies to the states as well as to draw this Court's attention to the Indiana Supreme Court's refusal to consider the merits of Petitioner's federal defense, a refusal that arose out of that court's explicit discrimination against a federal right because it was "*federal.*" Pet. App. 9. This is a serious error that threatens the federal rights of criminal defendants in Indiana and throughout the United States. NACDL brings a unique perspective on this issue as its members count on courts—both state and federal—to consider the merits of their arguments regardless of source.

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[1] The parties have given blanket consent to the filing of amicus briefs in this matter and have received notice of NACDL's intent to file this brief. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

SUMMARY OF ARGUMENT

The Indiana Supreme Court did not try to hide that it was discriminating against Timbs's federal constitutional arguments because they were federal. As that court explained,

> Indiana is a sovereign state within our federal system, and we elect not to impose federal obligations on the State that the federal government itself has not mandated. An important corollary is that Indiana has its own system of legal, including constitutional, protections for its citizens and other persons within its jurisdiction. Absent a definitive holding from the Supreme Court, we decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution.

Pet. App. 9. In other words, the Indiana Supreme Court believed that it was not bound by the text of the U.S. Constitution in the absence of an explicit holding by this Court commanding obedience.

This is a troubling development. Not only is constitutional supremacy inherent in the very concept of a national constitution, but it is also explicitly set forth in the text so as to remove all doubt. As Article VI provides, "[t]his Constitution" as well as all laws and treaties made pursuant to it "shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. In making this explicit, the framers "removed every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution." 3 Joseph Story,

Commentaries on the Constitution § 1839 (3d ed. 1858).

This was a prescient decision. Despite being bound by oath or affirmation to support the federal Constitution, state court judges have on occasion nevertheless discriminated against federal rights. Starting with *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816), a long line of this Court's cases has rejected such maneuvers. And it is now well established that the Constitution "forbids state courts to dissociate themselves from federal law because of disagreement with its content and a refusal to recognize the superior authority of its source." *Howlett* v. *Rose*, 496 U.S. 356, 371 (1990).

While this Court has not yet definitely held that this norm of non-discrimination applies specifically to federal defenses, the logic of *Martin*, *Howlett*, and numerous other cases dealing with federal claims compels that conclusion. Nor is there any reason for treating incorporation cases as exempt from the non-discrimination rule. As this case demonstrates, a state court's refusal to consider federal defenses can have profound consequences for individual criminal defendants, and it threatens the very principles of union and subsidiarity that makes a federalist system of government possible. NACDL therefore respectfully requests that this Court take this opportunity to clarify that states may not discriminate against federal defenses because they are federal.

ARGUMENT

I. STATE COURTS MAY NOT DISCRIMINATE AGAINST FEDERAL DEFENSES

A. The Supremacy Clause Requires State Courts to Adjudicate Federal Law When Applicable

As the founders recognized, the supremacy of the Constitution is inherent in the very nature of a national charter. To allow the contrary rule to prevail would effect "an inversion of the fundamental principles of all government," producing "a monster, in which the head was under the direction of the members." The Federalist No. 44, at 287 (James Madison) (Clinton Rossiter ed., 1961). Thus, the Supremacy Clause merely "declare[d] a truth which flows immediately and necessarily from the institution of a federal government." The Federalist No. 33, at 205 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *accord* Story, *supra*, § 1837 ("The propriety of this clause would seem to result from the very nature of the constitution."). And the concluding words of that Clause—expressly obligating state court judges to apply federal law notwithstanding any state law to the contrary—were likewise "introduced from abundant caution, to make [the Supremacy Clause's] obligation more strongly felt by the state judges" and to thereby "remove[] every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution." Story, *supra*, § 1839.

The Supremacy Clause is more than a constitutionally mandated choice-of-law provision; its very "purpose and effect" is to recognize "the fact that the States of the Union constitute a nation." *Testa* v. *Katt*, 330 U.S. 386, 389 (1947). This is because, as

Hamilton explained, "the national and State [court] systems are to be regarded as ONE WHOLE." The Federalist No. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961). And state courts are thus "not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States." *Martin*, 14 U.S. (1 Wheat.) at 340–41; *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 489 (1954) ("The law which governs daily living in the United States is a single system of law."). "From the very nature of their judicial duties," state judges, like their federal colleagues, are "called upon to pronounce the law applicable to the case in judgment." *Martin*, 14 U.S. (1 Wheat.) at 340. Indeed, they are bound to do so by oath or affirmation. *See* U.S. Const. art. VI, cl. 3 ("[J]udicial officers . . . of the several States [are] bound by oath or affirmation, to support this Constitution.").

Thus, when "in the exercise of their ordinary jurisdiction, state courts" hear "cases arising under the [C]onstitution," they must interpret the Constitution in those cases just as federal courts must. *See Martin*, 14 U.S. (1 Wheat.) at 342; *see also* Hart, *supra*, at 507 ("if a state court undertakes to adjudicate a controversy it must do so in accordance with whatever federal law is applicable"). In fact, had Congress not elected to establish the lower federal courts under Article III § 1, state courts would have provided the *only* forum for initial enforcement of federal rights at the trial level. *See* Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030, 1030 (1982) ("Congress is free to decide that there should be no lower federal courts at all. This would leave all questions of federal law (including the enforcement of federal rights) wholly to the

state courts in the first instance, subject to review in the United States Supreme Court.").

Those accused of crimes thus depend upon state judges to give serious attention to the federal constitutional arguments raised by counsel, regardless of whether this Court has spoken to the particular issue, and regardless of whether it is an easy or difficult question. Criminal defendants, after all, generally do not get to decide whether they are prosecuted in state or federal court, and there is no general right of removal for a defendant facing charges in state court. *See* 4 Wayne R. LaFave et al., *Criminal Procedure* § 13.5(d) (4th ed. 2017)*; see also Franchise Tax Bd.* v. *Constr. Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983).

The importance of state courts' fully considering arguments rooted in federal law can also be seen in how deferential federal courts are to state court decisions when considering federal habeas corpus petitions. A federal court can grant an application for a writ of habeas corpus only if the state decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," or if the decision "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). This deference assumes that the "considered conclusions of a coequal state judiciary" deserve "great weight" from the federal courts. *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985). And when state courts refuse to meaningfully consider constitutional claims raised in good faith, it is criminal defendants who suffer. *See, e.g.*, *Lafler* v. *Cooper*, 566 U.S. 156, 173 (2012) (finding that state court "identified respondent's ineffective-assistance of-counsel claim but failed to apply *Strickland* to assess it," and that federal courts could thus grant relief to defendant).

B. Where State Courts Have Attempted to Escape Their Constitutional Duty to Apply Federal Law, This Court Has Repeatedly Held Them Accountable

Thankfully, "[s]tate courts ordinarily fulfil such obligations without question." Hart, *supra*, at 516. For otherwise, the Supremacy Clause "would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue." *Martin*, 14 U.S. (1 Wheat.) at 342. But this is not to say that there has never been controversy about the matter. Quite the contrary: starting with state resistance to the Alien and Sedition Acts, the meaning of the Supremacy Clause was perhaps the central theme in American constitutional law in the decades prior to the Civil War. Throughout the early part of the Nineteenth Century, there arose "[v]iolent public controversies" on such questions, including "instances in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes." *Testa*, 330 U.S. at 390.

This Court therefore found it fitting in 1876, "after the fundamental issues over the extent of federal supremacy had been resolved by war," *id.*, to unanimously reaffirm that "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are." *Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876). As *Claflin* explained, state courts may not treat federal law as though it were foreign: "the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Id.* at 137.

Since *Claflin*, this Court has repeatedly held that the Constitution not only gives state courts the power to enforce federal rights but also prohibits them from refusing to enforce federal rights because they are federal. *See, e.g.*, *Testa*, 330 U.S. at 388 (Rhode Island court could not refuse to entertain a federal cause of action on the ground that it was "a penal statute in the international sense," where the same type of claim would have been enforced under state law); *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230, 234 (1934) (Alabama court could not decline jurisdiction "based solely upon the [federal] source of law sought to be enforced"); *Howlett* v. *Rose*, 496 U.S. at 371 (Florida court could not decline jurisdiction in a § 1983 case against a local school board on the ground that the state's waiver of sovereign immunity applied only to state causes of action and not their federal equivalents).[2]

In other words, "[a] state may not discriminate against rights arising under federal laws." *McKnett*, 292 U.S. at 234. Nor may a state court refuse to enforce a federal cause of action based on a disagreement between state and federal policy. *See Mondou* v. *N.Y., New Haven & Hartford R.R.*, 223 U.S. 1, 4 (1912).

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[2] The same holds true in this Court's "valid excuse" cases. *E.g.*, *Alden* v. *Maine*, 527 U.S. 706 (1999) ("[T]here is no evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action."); *Herb* v. *Pitcairn*, 324 U.S. 117, 123 (1945) (holding that an Illinois court's dismissal on statute-of-limitation grounds did not violate the "qualification that the cause of action must not be discriminated against because it is a federal one"); *Douglas* v. *N.Y., New Haven & Hartford R.R.*, 279 U.S. 377, 387-88 (1929) (finding that a New York court's dismissal of an action under a federal statute by a nonresident against an out-of-state corporation constituted a valid excuse).

To date, this Court's precedents in this area have been limited to state court discrimination against federal causes of action. *See, e.g.*, *Bell* v. *Sellevold*, 713 F.2d 1396, 1401 (8th Cir. 1983) ("[T]he state courts would probably be constitutionally compelled to hear and decide any federal defenses." (citing *Testa*, 330 U.S. 386)); *Rodriguez* v. *Westhab, Inc.*, 833 F. Supp. 425, 427-29 (S.D.N.Y. 1993). But the force of their logic applies equally in the case of a state court's refusal to enforce a federal defense.

The reasons offered by the Indiana Supreme Court for not addressing the merits of Timbs's assertion of his constitutional rights are precisely those that this Court has time and again found to be impermissible. After first noting the absence of binding precedent from this Court on the precise constitutional question raised by Timbs, the Indiana Supreme Court "decline[d]" to decide the issue. Pet. App. 8. In doing so, the court explained—with jaw-dropping candor—that it felt no need to "impose federal obligations on the State that the federal government [had] not mandated" as this would involve "subject[ing] Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." *Id.* at 9.

These reasons unambiguously express an improper hostility toward Timbs's asserted rights because of their federal nature and, furthermore, express a policy preference for the development of state law in the Indiana Courts under the Indiana Constitution over the policy choices embodied in the text of the Fourteenth Amendment. This failure is a threat to the rights of all who might come before a state court, especially those like Petitioner who are accused or convicted of crimes. This Court should therefore use this opportunity to clarify that the Supremacy Clause

binds state courts in equal measure whether they are confronted with a federal defense or a federal cause of action.

II. FEDERAL DEFENSES BASED ON INCORPORATION ARE NOT EXEMPT FROM THE NON-DISCRIMINATION RULE

At the heart of the Indiana Supreme Court's decision was the incorrect assumption that this Court's dictum in *McDonald* v. *City of Chicago.*, 561 U.S. 742, 753-66 (2010), that the Excessive Fines Clause "remain[s] unincorporated" should be deferred to as an affirmative declaration that that guarantee does not apply to the states. Thus, while the court below acknowledged that this Court "has never held that States are subject to the Excessive Fines Clause," it nevertheless concluded that addressing the merits of the issue or holding that the guarantee applied to the states would require "ignor[ing] *McDonald*." Pet. App. 5, 8. It therefore opted for what it termed the "cautious" approach of "await[ing] guidance from the Supreme Court and declin[ing] to find or assume incorporation until the Supreme Court decides the issue authoritatively." *Id.* at 8.

In reaching this conclusion, Indiana joined a significant minority of lower courts that have adopted similar rationales for ruling against those invoking the protection of the Excessive Fines Clause against a state. For example, in *Reyes* v. *North Texas Tollway Authority*, the district court engaged in a lengthy summary of this Court's decisions regarding the incorporation of the Excessive Fines Clause, reasoning "that [that clause] has not yet been incorporated against the states through the Due Process Clause of the Fourteenth Amendment," and, as a result, "a state-created entity like the [defendant] could not have violated it." 830 F. Supp. 2d 194, 207-08 (N.D.

Tex. 2011); *see also State* v. *Forfeiture of 2003 Chevrolet Pickup*, 202 P.3d 782, 783 (Mont. 2009) ("[W]hat Warner asks this Court to do is hold that the Eighth Amendment to the federal constitution is applicable to Montana, when the federal courts have not done so. We decline this invitation."); *In Re Forfeiture of 5118 Indian Garden Rd.*, 654 N.W.2d 646, 648 (Mich. Ct. App. 2002) ("We decline to address the federal constitutional issue because 'the United States Supreme Court has never determined that the [federal] Excessive Fines Clause is applicable to the states through the Fourteenth Amendment [of the United States Constitution].'") (alterations in original) (quoting *In re Forfeiture of $25,505*, 560 N.W.2d 341, 347 (Mich. Ct. App. 1996)).

This reasoning wrongly interprets the fact that this Court has not authoritatively addressed the issue as an indication that incorporation of this right was viewed by this Court with disfavor. "That the Supreme Court has not yet issued a case expressly incorporating the Excessive Fines Clause . . . does not mean that it is not incorporated." *SFF-TIR, LLC* v. *Stephenson*, 262 F. Supp. 3d 1165, 1224 n.78 (N.D. Okla. 2017). Nor is the statement that the Excessive Fines Clause "remain[s] unincorporated" an indication about the Court's views of the matter, much less an excuse to refrain from engaging with the merits of Petitioner's defense.

As Judge Browning has thoughtfully explained, "[t]wo particularities of the incorporation context often obfuscate this seemingly mundane observation." *Id.* "First, only the Supreme Court—and not the Courts of Appeals—can bind state courts, even on matters of federal law." *Id.* And second, "state courts have little incentive to hold that a federal constitutional right is incorporated if the Supreme Court has

left the question open. The Bill of Rights is a floor, not a ceiling, and state courts can interpret their own constitutions . . . or statutes to provide for the right in question." *Id.* As explained above, the Indiana Supreme Court was unusually explicit on this point, actively discriminating against Petitioner's federal defense in order to give greater scope to Indiana's own constitution. Puzzlingly, however, it did so only after first acknowledging that *McDonald* was not binding and that it had left the question open.

The "deference" exhibited by the Indiana Supreme Court thus seems to be based on an unstated belief that incorporation is a quasi-legislative decision that is somehow the special province of this Court, performing what Professor Corwin memorably called a rite of constitutional "transubstantiation whereby the Court's opinion of the Constitution . . . becomes the very body and blood of the Constitution." Edward S. Corwin, *Court Over Constitution: A Study of Judicial Review as an Instrument of Popular Government* 68 (1957). This was a mistake. This Court is not "a legislature charged with formulating public policy." *Reno* v. *Flores*, 507 U.S. 292, 315 (1993) (quoting *Schall* v. *Martin*, 467 U.S. 253, 281 (1984)); *see also* The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (The judiciary "may truly be said to have neither FORCE nor WILL but merely judgment."). Nor does the fact that this Court has the final word on many questions of constitutional interpretation grant state courts a right to discriminate against those seeking to enforce rights that have not yet been held to be incorporated by this Court.

As the Indiana Supreme Court acknowledged, "[w]hether a Bill of Rights provision applies to the States is a purely legal question." Pet. App. 4. Specifically, it is a legal question about the meaning of the

Fourteenth Amendment. It is thus telling that the Indiana Supreme Court never quoted or discussed the meaning of the text of that provision, which is explicit in its limitation on state power: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *see also McDonald*, 561 U.S. at 753–66 (discussing the history of incorporation).

As explained above, that the Indiana Supreme Court is a creature of state law is no basis for abstention—a point underscored by the Fourteenth Amendment's explicit limitations on state power. Far from serving the interests of federalism, as the Indiana Supreme Court claimed, refusing to consider the merits of Petitioner's arguments ensured that Indiana would have no voice on the issue. *Cf. E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977) (observing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

There is, in a word, no basis for treating incorporation as exempt from the Constitutional requirement that state courts consider federal rights on the same terms as state rights.

CONCLUSION

For these reasons, the judgment of the Indiana Supreme Court should be reversed, and this Court should clarify that state courts may not discriminate against federal defenses because they are federal, regardless of whether the defendant asserts that a particular right applies against the states through the Fourteenth Amendment.

Respectfully submitted,

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No. 17-1091

In the
Supreme Court of the United States

TYSON TIMBS, et al.,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Writ of Certiorari
to the Indiana Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioner Tyson Timbs.[1]

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded over 45 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in numerous United States Supreme Court cases in defense of property owners. *See, e.g.*, *Knick v. Township of Scott*, No. 17-647, 138 S. Ct. 1262 (2018) (granting cert.); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF also often represents property owners facing large fines for using their own property. *See, e.g.*, *Sackett v. EPA*, 566 U.S. 120, 127 (2012) (property owners facing $75,000 per day fines); *Nemhauser v. City of Mount Dora*, No. 5:18-cv-00087, slip op. at 2 (M.D. Fla. Feb. 21, 2018) (property owners facing $100 per day fines, exceeding $10,000, for Van Gogh-style

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

mural). Because of its experience representing property owners facing potentially ruinous fines and penalties, PLF believes that its perspective will aid this Court in considering whether the Excessive Fines Clause protects Mr. Timbs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae PLF files this brief to draw this Court's attention to state and local governments' abuse of their power to fine and forfeit property. Local governments today often regulate innocuous activities like residential landscaping choices or minor home improvements, and punish people for failing to comply. Some fines vastly outweigh any potential public harm caused by the violation. It is common for such fines to accrue by the day, causing property owners who cannot afford to fix a violation, or who fail to receive notice, to lose the entire value of their property. Weighty fines can lead property owners to abandon constitutional rights or property interests to "play it safe" and avoid potential financial ruin by "fighting city hall."

In the absence of meaningful protection from this Court, state and local governments across the country have imposed immense fines for small violations of the law. As the examples in this brief will demonstrate, no offense is too small and no fine too big according to many state and local agencies, so long as the applicable statute, ordinance, or regulation authorizes the fine.

When proceeds from fines subsidize the enforcing agency's budget, local officials have an incentive to pick the harshest penalty available under

law, regardless of whether that penalty is proportionate to the offense. This incentive is particularly visible in communities that have struggled to balance their budgets, like Wayne County, Michigan, discussed below. Consequently, excessive fines subsidize government operations, augmenting tax revenue by shifting to hapless individuals a disproportionate share of the tax burden that should be borne by the public as a whole.

Amicus curiae PLF asks this Court to hold that the Eighth Amendment is incorporated against the states by the Fourteenth Amendment and to affirm that a fine does not satisfy the Constitution merely because it is within a legislatively set limit. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Deference to the policy decisions of legislative bodies does not mean courts should abandon their duty to protect human dignity. "While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.*

ARGUMENT

I

IN THE ABSENCE OF MEANINGFUL JUDICIAL SCRUTINY, STATE AND LOCAL GOVERNMENTS ABUSE THEIR POWER TO IMPOSE FINES FOR MINOR VIOLATIONS OF LAW

Previous generations would be baffled by a survey of state and local rules in modern America. Local laws that subject property owners to fines include a wide array of harmless activities—like

having too many cars in the driveway,[2] parking on the lawn next to the driveway,[3] peeling paint,[4] cracks in a residential driveway,[5] having long grass, or not planting enough grass.[6] Although these violations at times may even be processed as criminal, the only harm in many cases is to a fussy neighbor's aesthetic ideals. Courts have largely allowed such pervasive rules, and deferred to whatever punishment local agencies demand. As a result, volumes could be written about the outrageous fines property owners face for minor offenses. Without meaningful protection from this Court, there is little brake on the

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[2] *See, e.g.*, Common Violations Found in Residential Neighborhoods, Cobb County Government, https://cobbcounty.org/index.php?option=com_content&view=article&id=6891:common-violations-found-in-residential-neighborhoods&catid=571&Itemid=2111 (single family homes only allowed to park one car per 390-square-feet of living space); Jim Strikland, *County threatens to fine family for having 'too many cars in driveway'*, Atlanta Journal-Constitution, July 20, 2015, https://www.ajc.com/news/local/county-threatens-fine-family-for-having-too-many-cars-driveway/WGtEsEqtsuekDA4c46XMuL/.

[3] *See, e.g.*, Karl Torp, *OKC Cracking Down On Residents Parking Cars On Grass*, Oklahoma City News 9, Feb. 2, 2017, http://www.news9.com/story/34414837/okc-cracking-down-on-residents-parking-cars-on-grass.

[4] *See, e.g.*, Jason Volentine, *Phoenix neighborhood fed up with person reporting homes for nit-picky repairs*, ABC15 Arizona, Jan. 25, 2018, https://www.abc15.com/news/state/phoenix-neighborhood-fed-up-with-person-reporting-homes-for-nit-picky-repairs.

[5] Scott Berson, *People in this city are sick of "ludicrous" fines from officials. Now they're suing*, Ledger-Enquirer, June 1, 2018, https://www.ledger-enquirer.com/news/state/georgia/article212322284.html.

[6] *Duffner v. City of St. Peters*, No. 4:16-CV-01971-JAR, 2018 WL 1519378, at *1 (E.D. Mo. Mar. 28, 2018).

outlandish fines local and state governments dream up.

A. Daily Fines in Florida

Municipalities and state agencies—like states themselves—commonly enjoy broad powers to impose fines. For example, in the state of Florida, state law allows local county and municipal code enforcement boards to impose fines of up to $500 per day for each violation of local code. *See* Fla. Stat. § 162.09. The statute makes no differentiation between trivial violations and severe ones that may threaten public health. *See id.*

Because state and federal courts have refused to recognize any meaningful constitutional limits on this statutory power to fine, property owners have been forced to pay unconscionable fines for small violations. For example, in 2011, one homeowner in Islamorada, Florida, was stunned to discover a $115,625 lien on his property when he sold his home. *Finger v. Islamorada, Vill. of Islands*, No. 16-AP-1-P, slip op. at 2 (16th Jud. Cir. May 2, 2017). The offense? The homeowner failed to register a newly installed burglar alarm with the local government. *Id.*

The town sent the homeowner a notice of the violation and the possibility of daily accruing fines of $75 per day. *Id.* But the owner did not understand the peril he faced and failed to get the pro forma permit. *See id.* at 2-3. Thus the fine accrued for months until the owner sold the property. When the homeowner begged for mercy, the town ultimately cut the $115,625 fine to $57,812. *Id.* at 2.

The sad irony of a burglar alarm installation causing a property owner to be robbed in broad

daylight by the government was lost on the board and on the local courts. When the owner protested that the fine violated the Excessive Fines Clause, the Florida circuit court held that it was inappropriate to question the policy decision of a legislative body. *Id.* at 4-5.

Indeed, this refusal to recognize that daily fines can be unconstitutionally excessive is a recurring problem in Florida. The Eleventh Circuit rejected a similar Eighth Amendment claim raised by octogenarian Jeannette Moustakis. *Moustakis v. City of Fort Lauderdale*, 338 F. App'x 820, 820 (11th Cir. 2009). Mrs. Moustakis had spent thousands of dollars hiring workers and architects to draw plans to remedy previously unpermitted improvements by bringing them into compliance with local codes. Brittany Wallman, *Code battle builds into $831,000 fine*, South Florida Sun-Sentinel, Aug. 14, 2009, http://www.sun-sentinel.com/local/broward/fort-lauderdale/sfl-moustakis-code-08-story.html. But she did not receive a permit. *Id.*

Fines accumulated at $150 per day and fast outgrew the value of the $200,000 home—totaling more than $700,000 by the time the Eleventh Circuit issued a decision in the case. *Moustakis*, 338 F. App'x at 822.[7] Nonetheless, the Eleventh Circuit rejected her claim, simplistically holding that "$700,000 is within the range of fines prescribed by the Florida Legislature and accordingly is due our substantial deference." *Id.* Because the fines accrued by the day, the court also held "the $700,000 fine is, literally, directly proportionate to the offense." *Id.*

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[7] Mrs. Moustakis died during litigation, and her son Albert took over the lawsuit.

B. Fines for Violating an Unusable Easement in California

Floridians are not alone in facing ruinous fines for small violations of law. In Malibu, California, Henny and Warren Lent face fines exceeding $4 million for a victimless regulatory offense. *Lent v. California Coastal Commission*, No. BS 167531 (Cal. Super. Ct. May 24, 2018). In 2002, they purchased their Malibu beachfront home, which they primarily use as a vacation rental. *Id.* at 2. In 1980, in exchange for a permit, previous owners dedicated a public access easement next to their home to the California Coastal Commission for it to build a stairway to allow the public to get from street level down to the beach below. *Id.* The government never planned or built a stairway to take advantage of that easement, so in 1983 the previous owners built themselves stairs from the street to the second story of the house and installed a locking gate to the stairwell to protect the home's privacy. *See id.* at 6. The unpermitted stairwell stayed in place for decades. *See id.* at 6-7.

The Coastal Commission demanded that the Lents remove the encroaching stairwell in 2014, and threatened them with $11,250 per day fines. *Id.* at 9-10. The Lents offered to remove the encroaching structure if and when the state actually constructed public stairs from the street to the beach. Such a public stairwell may not even be feasible and, indeed, the government agency never conducted a feasibility study. Finally, the Lents offered to pay a $100,000 penalty. Jeremy Talcott, Pacific Legal Foundation Blog, *CCC levies a $4.2m fine for blocking nonexistent staircase*, Dec. 9, 2016, https://pacificlegal.org/ccc-levies-4m-fine-blocking-nonexistent-staircase/.

Instead, the Coastal Commission issued a fine of $4,185,000—roughly the full value of the property itself at the time the fine was imposed. *Id.*

This enormous fine for the violation of an unusable public access easement is not justified. The Lent family has not impeded development of the easement; rather the government's own failure to plan or build a stairwell has made it impossible for the public to use it. *See id.*; *Lent*, No. BS 167531, at 2. The Lents appealed the fine to California state court, but that court held that because the fine was within the amount allowed by the California legislature, it was not excessive. *Id.* at 23. Guidance on the application of the Excessive Fines Clause from this Court is the only hope people like the Lents have of reducing fines to a reasonable size.

C. Fines for Residential Landscaping Choices

Many local governments across the nation have turned themselves into local landscaping authorities. Homeowners who think that the constitutionally protected right to use and enjoy their property[8] entails the right to freely landscape have faced stiff fines from local governments.

In Missouri, Carl and Janice Duffner face possible fines of $180,000 because they do not have turf grass in their residential yard. *See Duffner*, 2018 WL 1519378, at *1 (E.D. Mo. Mar. 28, 2018). According to the City of St. Peters regulations, at least half of the Duffners' yard must "be comprised of turf grass." *Id.* But the Duffners planted flowers instead,

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[8] *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544-45 (1972) (recognizing constitutional right to enjoy property).

because Mrs. Duffner is allergic to grass. *Id.* The zoning board eventually granted the Duffners a variance, reducing the required amount of turf grass to only five percent of the yard. *Id.* But this was still too much grass for Mrs. Duffner, so the couple sought relief in court.

The trial court ruled against them, rejecting their Excessive Fines claim because such fines were authorized by state law and the court had "not found, any case law holding that a penalty provision similar to that imposed by the City for violations of the Turf Grass Ordinance is excessive." *Id.* at *7.

Although a minimum grass requirement is rare, many other local governments regulate landscaping in other ways. Many cities have banned vegetable gardens in some manner—imposing harsh fines for people who dare grow produce on their land. *See, e.g.*, *Ricketts v. Vill. of Miami Shores*, 232 So. 3d 1095, 1096 (Fla. Dist. Ct. App. 2017), *review denied*, No. SC17-2131, 2018 WL 794717 (Fla. Feb. 9, 2018) ("Facing the threat of fines of $50 per day, Hermine and Tom destroyed their beloved garden . . . ."); Deborah Geering, *A guy, a garden and an anti-veggie zoning code*, Atlanta Magazine, Sept. 17, 2010, http://www.atlantamagazine.com/dining-news/ a-guy-a-garden-and-an-anti-veggie-zoning-code/ (man paid $5,200 in fines imposed by DeKalb County, plus paid a lawyer to apply to rezone his land so that he could continue his vegetable garden). Other communities cite responsible[9] homeowners when a plant or some

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[9] Fines do not only hurt irresponsible people. Even government agencies run afoul of local code enforcement. For example, in the last year, the Hamilton County Land Bank was fined a total of $115,450 by the City of Cincinnati for tall grass or litter found on

grass dies. *See, e.g.*, Kevin D. Thompson, *Commentary: Is Lake Worth homeowner's dying lawn worth a citation?*, Palm Beach Post, May 13, 2016, https://www.palmbeachpost.com/news/local/commentary-lake-worth-homeowner-dying-lawn-worth-citation/w0ZbQ9uQzvTAaO8wYgWAtI/ (faced fines from the City of Lake Worth when some of her grass died over the winter, leaving an "unsightly" sandy spot).

In another example, Roger and Myrna Byrd were fined $1.6 million for cutting down mangroves on their Jupiter, Florida, property without a permit. *Town of Jupiter v. Byrd Family Tr.*, 134 So. 3d 1098, 1100 (Fla. Dist. Ct. App. 2014). The property was only worth approximately $1.2 million. Bill DiPaolo, *Byrds' final mangrove fine $49,000, but was it still a good investment?*, Palm Beach Post, Apr. 6, 2016, https://www.mypalmbeachpost.com/news/local/byrds-final-mangrove-fine-000-but-was-still-good-investment/guFZajoOJIWCvLopFKoVBN/. The Byrds ultimately succeeded in avoiding the excessive fines not with the Eighth Amendment, but by proving the local regulations were preempted by state law. *See id.* (The Byrds ultimately paid the state environmental agency's $45,000 fines and legal fees.); *Byrd*, 134 So. 3d at 1100-101. But the Eighth Amendment should prevent such fines, even when state and local laws do not come to the rescue.

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its properties. Paula Christian & Craig McKee, *I-Team: Who owes $115,450 in fines for weeds and litter, but won't pay a cent?*, WCPO Cincinnati, Aug. 30, 2018, https://www.wcpo.com/news/insider/i-team-who-owes-115-450-in-fines-for-weeds-and-litter-but-won-t-pay-a-cent-.

II

WITHOUT EXCESSIVE FINES PROTECTION, LOCAL GOVERNMENTS WILL EXPAND FORFEITURE ABUSES TO INCLUDE MORE NON-CRIMINAL ACTIVITY

"[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., plurality opinion). Government agencies stand to benefit when they use their fining or forfeiture power, and consequently courts should closely scrutinize such action.

There is perhaps no more troubling and unjust example of an abuse of the forfeiture power as what Oakland County, Michigan, did to 82-year-old, Uri Rafaeli. Mr. Rafaeli inadvertently underpaid the 2011 property taxes on his $60,000 Southfield, Michigan, home by $8.41. *See Rafaeli, LLC v. Oakland County*, No. 330696, 2017 WL 4803570, at *5 (Mich. Ct. App. Oct. 24, 2017) (Shapiro, J., concurring). Rafaeli paid the 2012, 2013, and early 2014 taxes in full and on time. Nevertheless, in 2014, Oakland County foreclosed on the property to collect the $8.41 tax deficiency dating back to 2011. *Rafaeli, LLC v. Wayne County*, No. 14-13958, 2015 WL 3522546, at *2 (E.D. Mich. June 4, 2015). The County auctioned the property for $24,500 and refused to refund Rafaeli any of the $24,215 that exceeded the total tax debt, penalties, interest, and costs. *Id.* The County called the taking of the property a forfeiture, even though the property was neither an instrumentality nor product of criminal activity. *See Rafaeli*, 2017 WL 4803570, at *5.

The only offense by Mr. Rafaeli was non-criminal—the failure to pay property taxes in full and on time. Rafaeli filed a takings claim seeking the equity that exceeded the $285 in taxes, penalties, interest, and fees, but the Michigan Court of Appeals disagreed, deeming it a valid forfeiture.[10] *Id.* at *1. Rafaeli's petition seeking leave to appeal to the Michigan Supreme Court is still pending. *See Rafaeli, LLC v. Oakland County*, No. 156849 (pending). An Excessive Fines claim pursuant to the Eighth Amendment is not yet viable as a remedy for cases like Mr. Rafaeli's because Michigan is one of those states—like Indiana, the Defendant in the instant case—that has not recognized the incorporation of the Eighth Amendment.

Rafaeli's story is not unique. Many other property owners in Michigan have lost tens of thousands of dollars in equity—beyond what they owed in taxes, interest, fees, and penalties. *See, e.g.*,

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[10] To be sure, amicus curiae believes the confiscation of Mr. Rafaeli's property is best classified as an uncompensated taking. *See, e.g., Thomas Tool Services, Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000) (statute granting government surplus proceeds from tax sales violates state constitution's Takings Clause); *Bogie v. Town of Barnet*, 270 A.2d 898, 903 (Vt. 1970) (retention of excess funds from sale of foreclosed land "amounts to an unlawful taking for public use without compensation, contrary to . . . Vermont Constitution"); *Coleman through Bunn v. D.C.*, 70 F. Supp. 3d 58, 80 (D.D.C. 2014) (holding takings claim appropriate if D.C. law elsewhere recognizes property right in equity); *see also Armstrong v. United States*, 364 U.S. 40, 48 (1960) (Takings Clause protection doesn't simply disappear because the property owner owes the government money.). But this case is instructive, because it shows the perverse incentives for state and local governments to abuse forfeiture powers to punish minor offenses.

Wayside Church v. Van Buren County, 847 F.3d 812, 822 (6th Cir. 2017); *Donald Freed v. Michelle Thomas, et al.*, No. 17-CV-13519-BAF-PTM (E.D. Mich.) (County sold a $100,000 home for $42,000 to pay a $2,000 tax bill, and kept all proceeds) (pending). Such schemes most often hurt the elderly, sick, or economically distressed. *See, e.g.*, John Rao, The Other Foreclosure Crisis: Property Tax Lien Sales, National Consumer Law Center (NCLC) at 5 (July 2012), http://www.nclc.org/images/pdf/foreclosure mortgage/tax_issues/tax-lien-sales-report.pdf. While most states refund the surplus proceeds from the sale of tax distressed properties to the former owners,[11] Michigan—like only a few other states—empowers the foreclosing government unit to pocket the proceeds.[12]

Wayne County may be profiting more at the expense of struggling property owners than any other county from this tax foreclosure scheme. "Since 2012, Wayne County's treasurer has pumped an extra $382 million into the county's general fund" from fines and interest for late payments and by confiscating surplus profits from the sale of such foreclosures. *See, e.g.*, Joel Kurth, et al., *Sorry we foreclosed your home. But thanks for fixing our budget.*, Bridge Magazine, June 6, 2017, https://www.bridgemi.com/detroit-journal

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[11] *See, e.g.*, Ala. Code § 40-10-28; Fla. Stat. § 197.582; Ga. Code Ann. § 48-4-5; Me. Rev. Stat. tit. 36, § 949; 72 Pa. Stat. § 1301.19; 72 Pa. Cons. Stat. Ann. § 1301.2; S.C. Code Ann. § 12-51-130; Tenn. Code Ann. § 67-5-2702; Va. Code Ann. § 58.1-3967; Wash. Rev. Code Ann. § 84.64.080.

[12] Massachusetts, Minnesota, Montana, North Dakota, and Oregon have similar confiscatory laws. *Kelly v. City of Boston*, 204 N.E.2d 123, 125 (Mass. 1965); Minn. Stat. Ann. § 280.29; Mont. Code Ann. § 15-17-322; N.D. Cent. Code Ann. § 57-28-20.

ism-cooperative/sorry-we-foreclosed-your-home-thanks-fixing-our-budget.

Unless this Court sets meaningful standards to protect property owners from excessive fines and forfeitures, government will expand what can be considered a forfeiture/fine. Amicus Curiae asks this Court to set meaningful limits on this power.

CONCLUSION

This Court should hold the Excessive Fines Clause applies to the states and clarify that the clause requires courts to protect against the excesses of executive *and* legislative bodies.

DATED: September, 2018.

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No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS, *et al.*,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE RUTHERFORD INSTITUTE *AS AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the resolution of this case because it touches on core questions of individual liberty, which both the federal elements of our constitutional structure and the first eight Amendments in the Bill of Rights were created to protect and preserve. The Rutherford Institute writes in support of Petitioners on these issues.

SUMMARY OF ARGUMENT

1. The Excessive Fines Clause, and the goal of checking arbitrary exercises of a government's penal authority that it promotes, is deeply rooted in the Anglo-American legal tradition. Indeed, prohibitions on excessive governmental exactions predates our Republic by centuries, tracing their roots to the Magna Carta and the English Bill of Rights. Nor is there any basis in the text, purpose, or history of the Clause that justifies treating it differently than the Cruel and Unusual Punishments and Excessive Bail

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[1] This amicus brief is filed with the parties' consent. Petitioners filed their consent on July 12, 2018, and Respondent filed its consent on July 23, 2018. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

Clauses, both of which have been incorporated against the States.

Moreover, current practices by Indiana and other States that do not believe themselves bound by the Clause shows the wisdom of the Framers' efforts to restrain governments' power to fine. States and municipalities, always under budgetary pressure and seeking to raise revenue without raising taxes, face a strong temptation to use fines, civil penalties, and asset forfeitures to bridge their fiscal shortfalls. Resort to such revenue sources sours the relationship between citizens and their representatives, increases cynicism toward government at all levels, and erodes the public's trust in state and local justice systems. Applying the Excessive Fines Clause to the States helps assure that penal exactions are used for their proper purpose and do not become an instrument of tyranny.

2. The Indiana Supreme Court declined to find incorporation in this case because this Court had not yet found the Excessive Fines Clause incorporated. That decision—declining to address the merits of a federal-law defense properly raised in case before it on direct review—cannot be squared with the role of that court, and, more importantly, the role of *all* state courts, in the constitutional structure. Both the Supremacy Clause itself and the oath of support and defense of the Constitution that all state judicial officers are required to take mandate that state courts adjudicate issues of federal law on the same basis as they would issues of state law. Indeed, this is essential to our federal system because the Constitution does not create, and does not require Congress to create, inferior federal courts. As such, it would be perfectly consonant with the constitutional

design for the *only* trial-level forum for raising a federal-law issue to be a *state-court* forum.

ARGUMENT

I. THE EXCESSIVE FINES CLAUSE APPLIES TO STATE AND LOCAL GOVERNMENTS THROUGH THE FOURTEENTH AMENDMENT.

The Eighth Amendment prohibition against excessive fines easily meets the standard for incorporation through the Fourteenth Amendment. It is both "implicit in the concept of ordered liberty," and "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McDonald v. City of Chicago*, 561 U.S. 742, 760 (2010) (Alito, J.).

Any orderly system of justice requires that punishment be reasonably proportionate to the gravity of the offense. Disproportionate punishment not only shocks the conscience, but the capacity to inflict it also gives government coercive power that threatens the liberty of its citizens. Chief Justice Marshall famously observed, "[T]he power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). The power to fine carries the same potentially destructive power. Left unchecked, the sovereign can employ its power to punish by means of financial exactions that can operate to deprive citizens of their livelihoods, homes or even their ability to function as citizens. Indeed, the Eighth Amendment was enacted to constrain the government's power to punish. *Austin v. United States*, 509 U.S. 602, 609 (1993).[2]

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[2] Review of the proportionality of punishment, while deferential to legislative judgments, has invalidated excessive punishment even when authorized by statute. *See United States*

That a punishment takes the form of a deprivation of property does not lessen this concern. The text of the Fourteenth Amendment protects rights in property as well as life and liberty. The Court has long recognized that the Bill of Rights provisions protecting property may be sufficiently fundamental to be incorporated through the Fourteenth Amendment. *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (extending the Fifth Amendment prohibition against taking property without just compensation to the States).

"The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983). For example, three separate chapters of the Magna Carta prohibited excessive "amercements." *Id.* A prohibition against excessive fines also appeared in England's Bill of Rights. Its language was adopted verbatim by the drafter of Virginia Declaration of Rights and ultimately by the framers of the Eighth Amendment itself. *Browning-Ferris Ind. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-67 (1989). At the time of the adoption of the Federal Constitution, many State constitutions included prohibitions against excessive fines; the matter was uncontroversial. *Id.* at 264-65.

There is no textual or historical basis for excluding the Excessive Fines Clause from incorporation. The Cruel and Unusual Punishment and Excessive Bail Clauses have already been incorporated and there is

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v. Bajakajian, 524 U.S. 321, 337-40 (1998) (forfeiture of entire amount of unreported currency constituted excessive fine although expressly authorized by statute); *Weems v. United States*, 217 U.S. 349, 380-82 (1910) (invalidating excessive prison sentence authorized by statute).

no apparent rationale for concluding differently with respect to the Excessive Fines Clause. *Browning-Ferris*, 492 U.S. at 284 (O'Connor, J. concurring in part and dissenting in part). Indeed, a majority opinion of the Court has already remarked in dicta that "[The Due Process Clause of the Fourteenth Amendment] makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433-34 (2001). Moreover, the Excessive Fines Clause forms part of the text of the Eighth Amendment itself. The few instances where rights guaranteed in the Bill of Rights have not been incorporated against the States have largely been derivative rights, such as the right to a unanimous jury, not found in the text of the amendment but accepted as part of the judicial gloss accompanying and implementing it. *United States v. Basurto*, 117 F. Supp. 3d 1266, 1282 n.6 (D.N.M. 2015).

The treatment of punitive damage also supports the incorporation of the Excessive Fines Clause. Substantive due process rights under the Fourteenth Amendment, without reference to any incorporated portion of the Bill of Rights, limit a State's ability to punish through a punitive damages award in civil litigation. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). The Court has adopted substantial guidelines to assure that punishment meted out in civil lawsuits is not excessive. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).[3]

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[3] The standards adopted in *Campbell* and similar cases for determining the constitutional excessiveness of punitive damages awards probably provide the best available method for determining whether a particular state exaction is excessive under the Eighth Amendment. David Pimentel, Forfeitures and

Punitive damages and fines (including criminal forfeitures) are strikingly similar. The only legal distinction between financial punishment imposed through punitive damages payable to private litigants and fines and forfeitures is that only punitive exactions payable to a governmental entity implicates the Eighth Amendment. *Browning-Ferris*, 492 U.S. at 271-73. Otherwise, both forms of exactions are intended for punitive purposes, are financial in their impact, and can be measured in quantitative terms. The treatment of punitive damages provides a "logical constitutional analogue for forfeitures." David Pimentel, Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures, 11 Harv. L. & Pol'y Rev. 541, 566 (2017).

The power to fine is at least as great a threat to property rights as the power to award punitive damages. If anything, scrutiny of fines should be more robust than that of punitive damages because governments may impose them for reasons having nothing to do with a legitimate penal purpose. The protections developed in English law were "aimed at putting limits on the power of the King on the 'tyrannical extortions under the name of amercements, with which John had oppressed his people,' whether that power be exercised for purposes of oppressing political opponents, for raising revenue in unfair ways, or for any other improper use." *Browning-Ferris*, 492 U.S. at 271-72 (citations omitted). The inclusion of the prohibition against excessive fines in the English Bill of Rights was a reaction to abuses of the royal judges during the reigns

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the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures, 11 Harv. L. & Pol'y Rev. 541, 569-71 (2017).

of the Stuarts in levying large fines against the King's political enemies. *United States v. Bajakajian*, 524 U.S. 321, 335 (1998). None of the potential abuses of the power to fine are unique to the federal government rather than the States; there is no reason to believe that the property rights of citizens are less at risk when a State seeks to impose the fine.

Indeed, if anything, state and local governments are *more* likely to succumb to the temptation to abuse fines because of their need for revenue and their often significant constraints (whether legal or political) on their ability to raise that revenue. The governmental entity levying a fine or penalty also receives the financial benefit of the exaction. "A government has a greater incentive to abuse monetary impositions when it is the direct recipient of money than when it is refereeing a dispute between private third parties." *SFF-TIR, LLC v. Stephenson*, 262 F. Supp. 3d 1165, 1229 n. 78 (N.D. Okla. 2017).

Ample evidence suggests that some local governments have abused the power to fine. In some instances, fines and other exactions form a substantial portion of the local government's budget. In its investigation of the Ferguson, Missouri police force the Department of Justice found that for fiscal year 2015 fines comprised $3.09 million of the city's projected $13.26 million general fund revenues. United States Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* 9-10 (March 4, 2015). Police and other participants in the city's municipal justice system were urged to maintain revenues through the enactment of fines. *Id.* at 10-15. Indeed, the Justice Department investigation revealed that generating revenue had become a higher priority in the system than fairness in adjudicating cases or the needs of public safety. *Id.*

Ferguson is not an isolated case. A 2010 study by the American Civil Liberties Union reported that a substantial portion of the revenue for operating the New Orleans municipal courts was supplied by the very fines those courts imposed. American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons*, 25 (Oct. 2010). Unsurprisingly, this arrangement placed pressure on the participants to maintain a high level of revenues by imposing fines and other levies. *Id.* at 25-28.

The same perverse incentives are a feature of the forfeiture system. Many States have laws that grant law enforcement agencies or prosecutors' offices a share in the value of forfeited property. *See* Darpana Sheth, *Policing for Profit: The Abuse of Forfeiture Laws*, 14 Engage: J. Federalist Soc'y Prac. Groups, 24, 25-36 (Oct. 2013). The earmarking of forfeited property for law enforcement has been criticized for creating incentives to skew police and prosecution practices toward revenue collection. This has "led to egregious and well-chronicled abuses." *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., dissenting from denial of petition for writ of certiorari). *See* Karis Ann-Yu Chi, Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California, 90 Calif. L. Rev. 1635 (Oct. 2002); Eric Blumenson and Eva Nilsen, Policing for Profit: The Drug War's Hidden Economic Agenda, 65 U. Chi. L. Rev. 35 (Winter 1998).

The self-funding of enforcement agencies through forfeiture also creates serious separation-of-power concerns, as the agencies may grow partially independent of political control. Sheth, 14 Engage: J. Federalist Soc'y Prac. Groups at 26; Jefferson Holcomb, Tomislav Kovandzic and Marian Williams, *Civil*

Asset Forfeiture, and Policing for Profit in the United States, 39 J. Crim. Just. 273, 283 (2011).

Excessive fines may also be imposed through civil penalties. Such penalties are, by definition, punitive rather than compensatory. *Gabelli v. S.E.C.*, 568 U.S. 442, 452-52 (2013). Many state statutes authorize the State or a subdivision to seek a civil penalty for the violation of a statute, regulation, or ordinance. In Texas, for example, more than 30 statutes authorize the imposition of civil penalties. *See Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460, 467 (Tex. 2016). These statutes frequently impose substantial civil penalties on a per-violation or per-day basis. Hawaii's consumer protection statute provides for a minimum penalty of $500 and maximum penalty of $10,000 for each violation. Haw. Rev. Stat. § 480-3.1. The Texas Deceptive Trade Practices Act authorizes a civil penalty of up to $20,000 per violation, Tex. Bus. & Com. Code § 17.47(c)(1).

Consequently, a seller of many units of even an inexpensive product can face potentially ruinous liability, disproportionate to any actual harm done by the seller's misconduct. For instance, an Arkansas court multiplied the minimum statutory penalty of $5,000 for violation of Arkansas' Medicaid fraud statute by over 200,000 prescriptions in the State for the questioned drug, with each prescription counted as a separate violation, to impose a civil penalty of over $1 billion. *Ortho-McNeil-Janssen Pharm., Inc. v. State*, 432 S.W.3d 563 (Ark. 2014) (reversing penalty on state substantive grounds).

Minimum penalty provisions are particularly problematic because they divest courts of the discretion to impose small fines, appropriately calibrated to small offenses resulting in little harm. *See Town of Orono v.*

LaPointe, 698 A. 2d 1059, 1062 (Me. 1997) (reversing lower court decision that had suspended of all but $3,000 of a $73,000 fine for operating a junkyard without license because a court is not authorized to assess a lesser penalty than the minimum prescribed by statute).

Civil penalty actions are typically brought by state attorneys general or other state officials in state court. Frequently, private attorneys working on a contingency fee basis represent the State. *See* Donald Gifford, Impersonating the Legislature: State Attorneys General and Parens Patirae Product Litigation, 49 B.C. L. Rev. 913, 964-68 (2008). Such attorneys have an incentive to seek the largest penalty possible, not only to increase the ultimate fee award but to discourage the defendant from vigorously defending the action.

Because States are not citizens of States, such actions typically cannot be removed to federal court under ordinary diversity jurisdiction. *Moor v. Alameda Cty.*, 411 U.S. 693, 717 (1973). Nor are such actions regarded as class actions removable under the Class Action Fairness Act. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 168-75 (2014). Consequently, in a civil penalty case the state government acts as prosecutor, adjudicator, and recipient of the exaction all at the same time. The potential for a State to receive a substantial financial windfall from an out-of-state defendant creates a situation rife with the potential for abuse. A federal constitutional backstop in the form of the Eighth Amendment is urgently necessary.

Where financial punishments are disproportionate to the gravity of the offense, they may force innocent defendants to accept plea deals (or settlements in civil cases) rather than face the prospect of potentially

ruinous liability. *See In re Rhone-Poulenc Rorer Inc.*, 51 F. 3d 1293, 1298-1300 (7th Cir. 1995) (Posner, J.) (describing the pressure upon defendants to settle when a large number of claims are aggregated). In this way, excessive fines not only over-punish the guilty, but may punish the innocent as well. The Eighth Amendment prohibition of excessive fines provides a measure of protection from such risks. The Court should hold that it applies to the States via the Fourteenth Amendment.

II. THE INDIANA SUPREME COURT DISREGARDED ITS CONSTITUTIONAL OBLIGATIONS IN DECLINING TO RESOLVE THE MERITS OF THE INCORPORATION QUESTION.

1. In the decision under review, the Indiana Supreme Court "decline[d] to find or assume incorporation until the Supreme Court decides the issue authoritatively." *State v. Timbs*, 84 N.E.3d 1179, 1183 (Ind. 2017). It did so because "Indiana is a sovereign state within our federal system," and the court "elect[ed] not to impose federal obligations on the State that the federal government itself has not mandated." *Id.* at 1183-84; accord *id.* at 1184 ("Absent a definitive holding from the Supreme Court, we decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." (emphasis in original)).

The Indiana Supreme Court's rationale in this regard reflects a fundamental misunderstanding of that court's—and, for that matter, *all* state courts'—role in the constitutional structure.[4] In fact, the

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[4] It is possible that in reaching this conclusion, the Indiana Supreme Court misread this Court's decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which described the Excessive

Constitution clearly contemplates that questions of federal law will be raised, and must be resolved, in cases heard in state courts. Indeed, in many instances state courts are the only places where federal rights can be vindicated.

To begin, nothing in the text of the Constitution mandates the creation of inferior federal courts. *See* U.S. Const. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress *may* from time to time ordain and establish." (emphasis added)); *id.* art. I, § 8, cl. 9 (granting Congress the power "[t]o

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Fines Clause (as well as the Third Amendment and the Seventh Amendment's civil-jury requirement) as "not fully incorporated" against the States. *Id.* at 765 n.13. To be sure, the Court also framed the issue as one it "never ha[s] decided," *id.*, but the Indiana Supreme Court may have read the "not fully incorporated" language as a statement that the Clause could not apply to the States unless and until this Court issued a decision affirmatively incorporating it. *See Timbs*, 84 N.E.3d at 1183 (quoting and discussing *McDonald*). This is a serious misreading of *McDonald* because that case and other incorporation cases make clear that the Fourteenth Amendment is what incorporates any particular part of the Bill of Rights against the States, not a decision of the Supreme Court announcing that incorporation applies in a particular context. *McDonald*, 561 U.S. at 758-767 (discussing the theories of incorporation); *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) ("We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, are all to be enforced against the States *under the Fourteenth Amendment* according to the same standards that protect those personal rights against federal encroachment . . . ." (citations omitted) (emphasis added)). This case provides an opportunity for the Court to put the Indiana Supreme Court's misconception to rest by clarifying that state courts must address incorporation questions whenever the right in question is otherwise properly invoked in a case before them.

constitute tribunals inferior to the Supreme Court"); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448 (1850) (observing that the Constitution does not "ordai[n] and establis[h] the inferior federal courts" but instead endowed Congress with "the power to establish the courts"); *see also* 1 M. Farrand, The Records of the Federal Convention of 1787 124-25 (1911) (debating the removal of draft language that would have mandated the creation of inferior federal courts, recounting the observation of Messrs. Wilson and Madison "that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them," and recording a 9-2 vote (with one State divided) in favor of adding language "'that the National Legislature be empowered to institute inferior tribunals'"). Said otherwise, the Constitution contemplates and provides for a world in which the principal forum for the vindication of federal rights will be state (rather than federal) courts.[6]

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[6] In most instances, the existence of a defense grounded in federal law does not create a "federal question" sufficient to confer subject matter jurisdiction in the federal district courts. *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112-13 (1936) (existence of federal question must be disclosed on the face of the complaint); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for Southern Cal.*, 463 U.S. 1, 14 (1998) ("[A] case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint and even if both parties admit that the defense is the only question truly at issue in the case."). Hence, where a state court refuses to address a matter of federal law, it effectively denies the assertion of federal rights *in the only forum having jurisdiction to adjudicate the matter*. Nor is it any answer to say that, in such circumstances, review of the federal issue may be sought in this Court. The present case notwithstanding, securing review in this Court is no mean feat, particularly in cases that do not present the open issues and division of authority extant here.

As a consequence, state courts are required to consider and resolve not only federal causes of action, but federal rights and privileges raised in defense against civil or criminal charges brought in those courts. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 & n.4 (1981) ("Federal law confers rights binding on state courts, the subject-matter jurisdiction of which is governed in the first instance by state laws."); *Wisconsin v. Illinois*, 281 U.S. 179, 197 (1930) (declaring that even a State's constitution "must . . . yield to an authority that is paramount to the State"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-42 (1816) ("Suppose an indictment for a crime in a state court, and the defendant should allege in his defence that the crime was created by an ex post facto act of the state, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries."); The Federalist No. 82 (A. Hamilton) ("[T]he national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union.").[6]

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[6] In point of fact, the essential role and obligation of state courts (and other branches of state governments) to uphold the Federal Constitution was highlighted in the public debate leading up to the Constitution's ratification. As James Madison wrote in Federalist No. 44:

> It has been asked why it was thought necessary, that the State magistracy should be bound to support the federal Constitution, and unnecessary that a like oath should be imposed on the officers of the United States, in favor of the State constitutions. Several reasons might be assigned for the distinction. I content myself

The Indiana Supreme Court's contrary views notwithstanding, nothing about this arrangement is optional. Indeed, "[f]rom the very nature of their judicial duties [state courts] would be called upon to pronounce the law applicable to the case in judgment. They [a]re not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—'the supreme law of the land.'" *Martin*, 14 U.S. at 340-41; *cf.* U.S. Const. art. VI ("[A]ll . . . judicial officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution.").[7]

> with one, which is obvious and conclusive. The members of the federal government will have no agency in carrying the State constitutions into effect. *The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution.*

The Federalist No. 44 (J. Madison) (emphasis added).

[7] Were the rule otherwise, there would be reason to question the continued appropriateness of the well-pleaded complaint rule. *See* note 5, *supra*; *see also Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) ("It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. In a world where state tribunals effectively vindicate defendants' federal rights, cabining access to federal tribunals can be defended on federalism, comity, and economy grounds. But in a world where federal courts are the only forum where federal defenses will be adjudicated fairly and with dispassion—or, for that matter, adjudicated at all—such appeals to federalism, comity, and economy lose much of their force.

The Indiana Supreme Court thus erred in declining to decide whether the Excessive Fines Clause is applicable to Indiana via the Fourteenth Amendment.

2. One further point merits brief mention. The Indiana Supreme Court asserted that it would "not . . . impose federal obligations on the State that the federal government itself has not mandated." *Timbs*, 84 N.E.3d at 1183-84. This remark appears to misapprehend the courts'—and, in particular, *this* Court's—role in our constitutional architecture. When interpreting the dictates of the Federal Constitution, the courts are not "impos[ing] federal obligations" that did not previously exist, *id.*, but are instead announcing what the Constitution—in this case, the Fourteenth Amendment—has already imposed, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to *say what the law is*." (emphasis added)).

As a court whose decisions are ultimately reviewable in this Court, the Indiana Supreme Court thus had a clear and inescapable duty to answer that question in the first instance rather than await a pronouncement from this Court. *Cf. F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court . . . is one of final review, not of first view." (internal quotation marks omitted)).[8]

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[8] Many of the points above may appear somewhat academic given the small number of constitutional rights as to which the incorporation question remains open. The fact remains, however, that state courts must always stand ready to interpret and apply federal law with the same fidelity and care that they bring to bear in construing the laws of their respective States. Their failure to do so would do violence not only to the rights of individual

* * *

Regardless of what decision it might ultimately have reached on the merits of the Question Presented, decisions of this Court dating back to the dawn of our Republic make clear that the course chosen by the Indiana Supreme Court—declining to address a fairly raised and fully preserved defense grounded in the Eighth and Fourteenth Amendments to the U.S. Constitution—was indefensibly wrong. Indeed, as Chief Justice Marshall explained in *Marbury v. Madison*:

> [I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Marbury, 5 U.S. at 178. The Indiana Supreme Court failed to honor this principle. Its judgment should be reversed.

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litigants but to the federal system and structure established by the Framers.

CONCLUSION

The judgment of the Indiana Supreme Court should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

TYSON TIMBS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Writ of Certiorari
to the Supreme Court of Indiana

BRIEF OF *AMICI CURIAE* SCHOLARS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have given blanket consent to the filing of *amicus* briefs.

tive effects of civil asset forfeiture laws on the allocation of policing resources, including in *Bureaucrats, Their Incentives, and the War on Drugs*, 83 Public Choice 21 (1995); *Predatory Public Finance and the Origins of the War on Drugs: 1984-1989*, Independent Rev. 21 (1996); *Entrepreneurial Police and Drug Enforcement Policy*, 104 Public Choice 285 (2000); *Escalating the War on Drugs: Causes and Consequences*, 20 Stan. L. & Pol'y Rev. 293 (2009); *The Allocation of Police in Handbook on the Economics of Crime* (B. Benson & P. Zimmerman, eds. 2010); and *Predatory Public Finance and the Evolution of the War on Drugs* in *For Your Own Good: Taxes, Paternalism, and Fiscal Discrimination in the Twenty-First Century* (A. Hoffer & T. Nesbit, eds. 2018).

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SUMMARY OF ARGUMENT

State and local governments have been levying greater and greater fines and relying heavily on forfeitures in recent years, often at the expense of people who can least afford to pay. Fines and forfeitures are punishments, but they can also make money for cities and states, which gives governments an incentive to increase these punishments to excessive levels.

The Framers recognized this danger, and included the Excessive Fines Clause in the Bill of Rights to prevent such abuses. But, partly because the Clause has

not yet been incorporated against the states, many states and cities are indeed levying excessive fines and forfeitures.

Some fine the poor more often and in greater amounts, and throw those who cannot pay into what has been described as modern-day debtor's prisons. Forfeiture practices also hit financially vulnerable communities particularly hard. And because this is a financially profitable enterprise, it is often also politically profitable: many who bear the brunt of fines and forfeitures lack the political power to resist them. The government knows this, and also knows that raising broadly applicable taxes instead of raising revenue from fines and forfeitures would likely spur a political backlash.

But the right to be free from excessive fines and forfeitures[2] is a basic right of all Americans, recognized by the Framers as no less important than its Eighth Amendment siblings, the right to be free from cruel and unusual punishments and from excessive bail (as well as other fundamental rights, such as those secured by the First and Second Amendments). The Excessive Fines Clause should be recognized as a fundamental right incorporated by the Fourteenth Amendment against state transgressions, and as a bulwark against the states' financial and political incentives to increase fines and forfeitures more and more.

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[2] The Court has previously held that forfeitures constitute fines for the purposes of the Excessive Fines Clause. *See Austin* v. *United States*, 509 U.S. 602 (1993) (civil forfeitures); *Alexander* v. *United States*, 509 U.S. 544 (1993) (criminal forfeitures).

ARGUMENT

I. Unmanageable fines sharply affect the lives of many Americans

A. Excessive fines particularly harm poor Americans

Fines are the most common form of punishment used by local, state, and federal governments.[3] And their effect is not just broad but deep: they can drive poor Americans into a vicious cycle of growing economic disaster.

A fine that would be bearable (even if constitutionally excessive) to many of us may well be beyond a poor person's ability to pay. People's failure to pay promptly may lead to still greater fees and surcharges, and can harm their credit, which can make it harder for them to find stable housing and employment. The accumulated fees may also lead to jail time for failure to pay, or other penalties such as the loss of a driver's license—which may in turn cost people their jobs, particularly in rural or other areas with limited or no access to public transportation. All this makes it even harder for them to pay their ever-growing debt, a debt that began with the original fine but that continues to climb indefinitely.

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[3] Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards & Alexes Harris, *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 Ann. Rev. Criminology 471, 472 (2018); *see also* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. Ill. L. Rev. 1175, 1186-96.

Indeed, much of the burden stemming from fines is generally borne by the poorest citizens, who often accrue "poverty penalties" that may sharply exceed the monetary value of the original fine: late fees, interest fees, or administrative fees such as fees for entering into a payment plan.[4] Such poverty penalties are traps—easily stepped over by the majority of citizens who are able to pay, but serious obstacles with real consequences for those who are not. In some cases, debtors have been forced to choose between "basic necessities such as food, hygiene, and housing on the one hand, and making payments against their economic sanctions on the other."[5] In others, debtors are simply unable to pay the fines at all. And these problems also disproportionately affect black and Hispanic communities, as well as the poor of all races.[6]

The various fines, surcharges, fees, and costs that the government may impose in a given case can effectively stack up on each other, exacerbating what was already unmanageable debt. For Harriet Cleveland of Alabama, for example, the stacking of sanctions meant that, despite sustained efforts to pay, she could never

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[4] Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2, 2-8 (2018); Criminal Justice Policy Program at Harvard Law Sch., *Confronting Criminal Justice Debt: A Guide for Policy Reform* 15 (2016), http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf.

[5] Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 293 (2014).

[6] *See, e.g.*, Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 152 (2016).

overcome the debt imposed by a court for driving without insurance or a license.[7] The court sentenced her to pay a fine and court costs, and placed her on private probation with a $40 per month supervision fee.[8] Unable to find regular employment, Ms. Cleveland did what she could to pay—including turning her entire income-tax rebate over to the probation company, taking out a title loan on her car, "rent[ing] an empty room in her home to an elderly stranger with dementia," "sift[ing] through neighbors' trash for soda cans to cash in at the scrap yard," and even stealing $50 from her son's backpack and scrap metal from abandoned homes—but her debt still jumped from a few hundred dollars to $4,713 in four years.[9] When the probation company turned her file back over to the state, the state tacked on even more administrative fees and surcharges.[10] Like so many others, Ms. Cleveland had no meaningful ability to extricate herself from this punishment.

Indeed, some states systematically target poor people with fines. ArchCity Defenders, a nonprofit legal aid organization based in St. Louis, Missouri, found

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[7] Sarah Stillman, *Get Out of Jail, Inc.*, New Yorker 49 (June 23, 2014).

[8] *Id.* The government benefits financially when partnering with private probation and collections companies, both through collecting more money and because privatization relieves the government of the need to expend tax dollars for privatized services. *See* Colgan, *supra* note 4, at 28-25.

[9] Stillman, *supra* note 7, at 49-50, 53-54.

[10] *See id.*

that local governments in Ferguson and other municipalities were operating

> on the backs of their poorest and most politically vulnerable citizens. The municipalities appeared to be targeting low-income and black communities with these practices. For example, fines were collected at rates more than fifteen times higher in one low-income, majority-black community than in a more affluent neighboring municipality. Ferguson was among the three worst offenders.[11]

Nor are states necessarily deterred by the difficulty of collecting fines (however multiplied through late fees) from the poor: the threat of jail time can often be used to collect the money "from the families and friends of those arrested who wished to save their loved ones from languishing in jail."[12] (You can't get blood from a stone, but maybe from the stone's friends.) And because poor citizens are less likely to vote, and to have access to other forms of political power, governments

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[11] Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 Wm. & Mary L. Rev. 1171, 1174-75 (2017) (footnotes omitted); *see also* U.S. Dep't of Justice Civ. Rts. Div., *Investigation of the Ferguson Police Department* 52 (Mar. 4, 2015) (describing the fines imposed for minor offenses in Ferguson), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[12] *Id.* at 1204. Such jailing of people who are unable (rather than unwilling) to pay may be separately unconstitutional under *Bearden* v. *Georgia*, 461 U.S. 660 (1983); but if courts are barred from imposing excessive fines in the first place, that would yield much less occasion for such unconstitutional jailing. Colgan, *supra* note 11, at 1223-24 & n.302.

may find it easier to target fines against them. Meanwhile, as Ms. Cleveland discovered, politically influential private entities play a role in the money-making enterprise, stacking the deck further against the likelihood of meaningful resistance being brought to bear outside the courts.

Were the federal government to engage in such schemes to raise revenue, the Excessive Fines Clause would bar fines that are "gross[ly] disproportionat[e]" to the severity of the offense. *United States* v. *Bajakajian*, 524 U.S. 321 (1998). But when fines are imposed by those states whose courts have refused to incorporate the Clause—or by the many cities or counties within those states—no federal constitutional protection is available.

B. Excessive fines often lead to loss of licenses and other benefits, and to destroyed credit

Excessive, unaffordable fines often lead to the loss of government benefits such as housing assistance, supplemental security payments, and food stamps.[13] Failing to pay fines can also lead to the government revoking one's driver's license.[14] That in turn makes it

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[13] Some states have made it a violation of parole or probation for a person to not pay his fines. When one violates parole, one also loses government benefits. *See, e.g.*, 42 U.S.C. § 608(a)(9)(A); 7 U.S.C. § 2015(k)(1); 42 U.S.C. § 1437d(l)(9); 42 U.S.C. § 1382(e)(4)(A)(ii).

[14] Lawyers Comm. for Civil Rights of the San Francisco Bay Area, *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California* 9 (2016), http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-

harder for a person to get to work, to keep a job, and thus to earn money to pay the fines—which will then end up snowballing because of the failure to promptly pay. Nonpayment of criminal debt may also result in the denial of occupational licenses, likewise making it harder to get or keep a job.[15] And ongoing criminal debt can also destroy a debtor's credit, making it difficult to secure stable employment or housing. As the Washington Supreme Court explained,

> The court's long-term involvement in [debtor's] lives [during collections] inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their [criminal debt]. . . . This active record can have serious negative consequences on employment, on housing, and on finances. [Criminal] debt also impacts credit ratings, making it more difficult to find secure housing.[16]

Drive-Inequality-in-California-4.20.15.pdf; Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons.

[15] Colgan, *supra* note 4, at 80-81; *see also, e.g.*, Mo. Rev. Stat. § 302.755(17) (disqualifying use of a commercial driver's license for "failure to . . . pay"); Utah Code Ann. § 41-3-201(9)(a) (denying issuance of salvage license until full payment of restitution); Va. Code Ann. § 54.1-2813 (limiting eligibility for funeral services license until applicant "has successfully fulfilled all conditions of sentencing, been pardoned, or has had his civil rights restored").

[16] *State* v. *Blazina*, 344 P.3d 680, 684 (Wash. 2015) (citation omitted).

Excessive fines thus put financially vulnerable people into increasingly precarious circumstances. For many, their criminal debts can be effectively perpetual even for minor offenses.

C. Unmanageable fines often especially burden juvenile offenders

Unmanageable fines particularly harm poor youth and their families. They are assessed poverty penalties just as adults are,[17] but usually lack the resources to pay them; the practical cost is thus frequently borne by their parents, who are often already burdened with all the expenses of parenthood. Such sanctions thus

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[17] For instance, juveniles may be responsible for paying court expenses, public defender fees, evaluation and testing costs, treatment costs, health care costs, GPS monitoring costs, and cost of care. *See* Jessica Feierman, Nadia Mozaffar, Naomi Goldstein & Emily Haney-Caron, Juv. L. Ctr., *The Price of Justice: The High Cost of 'Free' Counsel for Youth in the Juvenile Justice System* 6-9 (2018), https://debtorsprison.jlc.org/documents/JLC-Debtors-Paying-for-Justice.pdf; Stephanie Campos-Bui et al., Berkeley L. Pol'y Advoc. Clinic, *Making Families Pay: The Harmful, Unlawful, and Costly Practice of Charging Juvenile Administrative Fees in California* 7-8 (2017), https://www.law.berkeley.edu/wp-content/uploads/2015/12/Making-Families-Pay.pdf; Jessica Feierman, Naomi Goldstein, Emily Haney-Caron & Jaymes Fairfax Columbo, Juv. L. Ctr., *Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System* 5, 13-15 (), https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf; Jeffrey Selbin et al., Berkeley L. Pol'y Advoc. Clinic, *High Pain, No Gain: How Juvenile Administrative Fees Harm Low-Income Families in Alameda County, California* 5-8 (2016), http://ssrn.com/abstract=2738710.

"cause families difficulty 'surviving on a day to day basis,'"[18] sometimes forcing them to choose between buying groceries and paying their fines.[19]

Excessive fines on juveniles may also have spillover effects on the juveniles' siblings. Forced to pay off one child's court fines, families may not have enough money for their other children's school clothes or college tuition.[20] At its most extreme, the financial pressure created by unmanageable economic sanctions can result in family disunification, as families struggle to maintain housing and other basic needs.[21]

Excessive fines also appear to increase adolescent recidivism. A recent study found that imposing restitution, imposing higher economic sanctions, and continuing debt obligations even when a case is closed "all significantly increased the odds of a youth recidivating. . . . even after controlling for relevant youth demographics and case characteristics variables."[22] Often, juveniles who fail to pay fines may be jailed, have

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[18] Feierman et al., *Debtors' Prison for Kids?*, *supra* note 17, at 6.

[19] *Id.* at 7.

[20] *Id.*

[21] Campos-Bui et al., *supra* note 17, at 10-11.

[22] Alex R. Piquero & Wesley G. Jennings, *Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 Youth Viol. & Juv. Just. 325, 334 (2017).

their driver's license revoked, or be prevented from expunging their records.[23] This traps them in the juvenile justice system, with little hope of getting out.[24]

The lingering effects of failing to pay juvenile fines, which include criminal contempt, probation violations, or additional fees, may even follow the juveniles into adulthood in the form of property liens, ineligibility for expungement, and destroyed credit.[25] And black and Hispanic youth and their families also appear to be disproportionately hurt by the juvenile system's fines. Even when the rate of juvenile crimes is similar among minority youth and white youth, minority youth are more likely than white youth to still owe money at the closure of their case.[26]

II. Like fines, forfeitures are ubiquitous and can be financially devastating

Forfeiture practices are widespread throughout the country—and financially lucrative. Many such seizures come out of "civil asset forfeiture" programs, in which the government secures a forfeiture without first obtaining a conviction, and at times without ever having filed criminal charges.[27] The drive to use forfei-

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[23] Feierman et al., *Debtors' Prison for Kids?*, *supra* note 17, at 23.

[24] *Id.*

[25] *Id.* at 7.

[26] Piquero & Jennings, *supra* note 22, at 331; *see also* Campos-Bui et al., *supra* note 17, at 11-14; Selbin, *supra* note 17, at 8-9.

[27] *See, e.g.*, Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 Stan. L. & Pol'y Rev.

ture to raise revenue may incentivize policing of offenses where seizures of cash or property are most likely, to the detriment of policing violent crimes.[28] While this may include seizures of high value items such as family homes[29] and automobiles, in some jurisdictions police are even seizing small amounts of cash during police encounters.[30]

Like fines, forfeitures can be financially devastating. Forfeiture practices often "target the poor and other groups least able to defend their interests in forfeiture proceedings."[31] A forfeiture may deprive people of cash they need for basic necessities, a car used to get to work or school, or even the roof over their and their family's heads.

293, 297 (2009); Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. 2015).

[28] *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 314 (1998).

[29] *See, e.g.*, Pamela Brown, *Parent's House Seized After Son's Drug Bust*, CNN (Sept. 8, 2014).

[30] Robert O'Harrow Jr. & Steven Rich, *D.C. Police Plan for Future Seizure Proceeds Years in Advance in City Budget Documents*, Wash. Post (Nov. 15, 2014); ACLU, *Guilty Property: How Law Enforcement Takes $1 Million in Cash from Innocent Philadelphians Every Year—and Gets Away With It* (June 2015).

[31] *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

III. Incorporation is necessary because states have strong financial incentives to raise revenue by levying excessive fines and forfeitures

Sovereigns are always thirsty for money, and fines and forfeitures are often an easy way to get this money. Fines and forfeitures are thus especially likely to be abused—which is why the forerunner of the Excessive Fines Clause in Anglo-American law dates back to Magna Carta.[32]

Today, the system of targeting the poor with fines and then imposing "poverty penalties" generates huge sums for states and localities, as do forfeitures. Such exactions operate as regressive taxes—people who are least able to pay end up paying the most.

And these practices are especially politically appealing because they reduce taxes for the wider population, while burdening those who are least likely to push back. The poor, who are most effected by excessive fines and forfeitures, are also among the least

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[32] The Clause was taken almost verbatim from Virginia's excessive fines clause, which was borrowed from the English Bill of Rights, which in turn dates back to Magna Carta. *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 266-68 (1989). Before Magna Carta, the King often imposed excessive fines on his subjects or political enemies to raise revenue. But under Magna Carta, the King was specifically limited in using fines as a source of royal revenue or as a weapon against his enemies. *Id.* at 268-72. Furthermore, provisions in Magna Carta explicitly stated that defendants' lives and their ability to maintain a livelihood should not be ruined by fines, and prohibited fines that bankrupted defendants. Colgan, *supra* note 5, at 321.

likely to vote.[33] They are less likely to acquire political power in other ways, such as through contributing to political campaigns. They are less likely to have friends in high places. And people with a criminal record may often be unable to regain their voting rights if they fail to pay their criminal debts. Laws in all but two states allow for continued disenfranchisement due to outstanding criminal debt regardless of whether the would-be voter has any meaningful ability to pay.[34]

Given this political reality, it is not surprising that fines and forfeitures are increasing: For example, Arizona originally imposed an extra 57% felony surcharge based on the combined total of other economic sanctions.[35] In 2012, that surcharge rose to 83%.[36] Similarly, in the past ten years the Department of Justice's asset forfeiture program has involved seizures of money and property totaling over $28 billion[37]—and

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[33] Daniel Weeks, *Why are the Poor and Minorities Less Likely to Vote?*, The Atlantic (Jan. 10, 2014), https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/ (citing U.S. census data showing that "47 percent of eligible adults with family incomes of less than $20,000 a year voted in 2012 and just one in four voted in the midterm election of 2010. By contrast, those with annual earnings of $100,000 or more turned out at rates of around 80 percent and 60 percent, respectively.")

[34] Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 Vand. L. Rev. (forthcoming 2019).

[35] Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 23-24 (2016).

[36] *Id.*

[37] Office of the Inspector General, U.S. Dep't of Justice, Review of the Department's Oversight and Cash Forfeiture Activities (Mar. 2017).

this excludes forfeitures obtained through local or state proceedings.[38]

And just as state legislatures have an incentive to create laws that lead to excessive fines and forfeitures, state courts have an incentive not to police them. Indeed, fines often fund the courts themselves.[39] Particularly in budget-strapped times, some governments become dependent on revenue from economic sanctions. One report noted that the "Nevada Supreme Court recently went broke because revenue from traffic tickets plummeted, and the city of San Jose, California, lamented the drop in traffic violation revenue."[40] An Oklahoma County District Judge was recently quoted as saying, "Today, we fund probably 90 percent or more of the operation of the courts actually out of the money that the court collects."[41]

Similarly, both fines and forfeitures can distort the priorities of prosecutors and law enforcement. A recent study has found that in cities that rely heavily on fines, fees, and forfeitures for revenue generation, violent and property crimes—which are less likely to lead to

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[38] *See, e.g.*, Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 Ohio St. L.J. 1409, 1432 (2001).

[39] Matt Ford, *The Problem with Funding Government Through Fines*, The Atlantic (Apr. 2, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-problem-with-funding-government-through-fines/389387/.

[40] Martin, *supra* note 3, at 477 (citations omitted).

[41] Kate Carlton Greer, *Over the Years, Court Fines, Fees Have Replaced General Revenue Funds*, KGOU (Feb. 9, 2015), http://kgou.org/post/over-years-court-fines-fees-have-replaced-general-revenue-funds.

such economic sanctions—are solved at significantly lower rates.[42]

These distortions may be exacerbated where prosecutors and law enforcement directly receive forfeiture funds.[43] For example, earlier this year a bill was filed in Alabama's legislature that would require a conviction prior to forfeiture and that would place revenue from forfeitures in the state's general fund. In response, the presidents of the Alabama District Attorneys Association and Alabama Sheriffs Association publicly stated that, if the bill was passed, prosecutors would file criminal charges in nonviolent and drug-offense cases against people who they otherwise would have believed better served by diversion programs, and law enforcement would stop policing drug and property crimes. Without receiving forfeiture funds, the groups reasoned, "[w]hat incentive would local police and sheriffs have to invest manpower, resources and time in these operations?"[44]

Recognizing the Excessive Fines Clause as limiting state and local action would not cure all these ills. It would only limit excessive fines and forfeitures, which this Court has defined as limited to those that are "gross[ly] disproportionat[e]." *Bajakajian*, 524 U.S. at

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[42] Rebecca Goldstein, Michael W. Sances & Hye Young You, *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, Urban Affairs Rev. 4, 11-17 (2018), http://journals.sagepub.com/doi/10.1177/1078087418791775.

[43] *See* Rachel A. Harmon, *Federal Programs and the Real Cost of Policing*, 90 N.Y.U. L. Rev. 970, 954-55 (2015).

[44] Brian McVeigh & Dave Sutton, *Don't Gut Civil Asset Forfeiture*, AL.com (Feb. 12, 2018), http://www.al.com/opinion/index.ssf/2018/02/dont_gut_civil_asset_forfeitur.html.

336-37. It would leave governments free to impose serious fines that are not excessive. Understandably, such fines and forfeitures may deliberately cause considerable economic pain, so as to deter and punish misconduct.

But incorporating the Clause would at least require state courts to police the outer boundaries of fines as a matter of federal right—and to recognize that state and local governments' growing appetite for raising money through fines must be subject to some constitutional constraint.

CONCLUSION

Anglo-American law has long recognized the wrongness of excessive fines and forfeitures, from 1215 to 1689 to 1791. That right is as important as the others that the Bill of Rights protects.

Indeed, for the poor, the right is especially important, because excessive fines and forfeitures can impose harsh burdens on poor defendants, burdens that have effects lasting for years. And revenue from fines and forfeitures tempts governments to constantly increase them, and state courts to neglect scrutinizing them. This Court should hold that the Excessive Fines Clause is incorporated against state and local governments—as are the other clauses of the Eighth Amendment, and the great majority of the other parts of the Bill of Rights.

Respectfully submitted,

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